QUARTERLY REPORT
of the
ATTORNEY GENERAL
of
ALABAMA

For the Period:

From January 1, 1936
Through March 31, 1936

VOL. II

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with an Act of the Legislature of Alabama found on page 1114 of the General Acts of Alabama, Regular Session, 1935, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This report covers all opinions rendered by the Attorney General from January 1, 1936 through March 31, 1936.

The Act referred to above requires that six copies of this Quarterly Report be sent to each of the Probate Judges in the State and that the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, and the County Superintendent of Education.

Respectfully,

A. A. CARMICHAEL,
Attorney General.

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OPINIONS

January 2, 1936.

Hon. D. E. Leslie,
Judge of Probate,
Macon County,
Tuskegee, Alabama.

Licenses.

1. Under Schedule 33, wholesale tobacco dealers are liable for one state license of $100.00 and $5.00 to each county in which they do business.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of November 26, 1935, which follows:

"Please advise me as to wholesale dealers in cigars, cigaretts, etc., as to license. I issued license to wholesale cigars $150.50. Under Schedule No. 33, and it seems that under this schedule $100.00 for the state and $5.00 for each county, instead of $50.00 for the county.

"Before refunding this money the clerk of the County Board of Revenue would like a ruling."

Schedule 33, Section 348, Chapter 1, Article XIII of the 1935 Revenue Act reads:

"Each wholesale dealer in cigars, cheroots, stogies, cigarettes, smoking tobacco, chewing tobacco, snuff or any substitute therefor, either or all, shall pay one privilege license to the State of One Hundred Dollars ($100.00), and Five Dollars ($5.00) to each county in which such wholesale dealer does business. The phrase 'wholesale dealer' as used in this Schedule shall include persons, firms, corporations, clubs, or associations who shall sell and/or store, or offer to sell any one or more of the articles enumerated herein to retail dealers for the purpose of resale only. The privilege license herein levied shall be in addition to the sales tax as provided in Schedule 159."

In an opinion of this office under date of October 29, 1935, to Hon. Eugene B. Henry, Commissioner of Licenses, Birmingham, Alabama, construing this Schedule, it was held:

"Schedule 33. As quoted by you, this provides one state license and a County license of $5.00 in each county in which such wholesaler of tobacco does business."

Therefore, you should have collected from the dealer mentioned in your letter $100.00 for State license and $5.00 for county license, instead of collecting $100.00 for State and $50.00 for county license as you did.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 2, 1936.

Hon. D. R. Boyd,
Deputy Solicitor,
Randolph County,
Roanoke, Alabama.

Veterans—Land purchased by World War Veteran with money received from the Government for disability compensation is not exempt from taxation in the State of Alabama.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of December 3, 1935, in which you state:

"At the request of the Tax Assessor and Tax Collector of this county, I will thank you to render us an opinion on exemptions of World War Veterans under circumstances as follows:

"The veteran expended money received as disability compensation for the purchase of real estate. Is this real estate exempt from taxation?

"I have not found any statute which exempts such real estate, but there may be some special Act or some Federal law covering the subject that I have omitted, and as the veteran is so earnestly contending, the tax officials wish your opinion."

You request my opinion: If this real estate is exempt from taxation?
It is my opinion that your question should be answered in the negative.

The Supreme Court of Alabama in the case of State v. Wright, 224 Ala. 357, 140 So. 584, held that property bought with money received under the Adjusted Compensation Act was subject to State and County taxation. The Court said as follows:

"It is well settled, that provisions for exemption from taxation must be construed strictissimi juris, and claims of exemption not clearly within the import of the language of the statute must be rejected. It is clear that the exemption applies only to compensation, insurance, and maintenance and support allowance, adjustment certificate and sums payable under the Act of Congress, and does not extend to privately owned property purchased with money arising from such sources, and which was at the time of the purchase within the jurisdiction of the State and subject to its power of taxation."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 2, 1936.

Hon. J. Lee Smith,
Judge of Probate,
Chilton County,
Clanton, Alabama.

Counties—not authorized to expend funds for the construction of a building to be used for living quarters by the sheriff or jailer.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of December 10, 1935, which is as follows:

"We shall appreciate your opinion as to the legality of the Commissioiners Court contracting for a building to be erected on the County Property, adjoining the County jail, which would be occupied by the Sheriff or jailer, and the kitchen of the said building to be used to prepare meals for the prisoners in the County jail.

"The County has been furnishing the Sheriff or Jailer living quarters for several years. And this building is now badly in need of repairs.

"We wish to know if the Commissioners Court has a legal right to contract for the new building and pay for same out of the County funds."

I am of the opinion that your inquiry should be answered in the negative. I am unable to find any authority of law authorizing the county to build living quarters for the sheriff or jailer.

The construction and maintenance of county buildings, including courthouse, is governed by Article 5 of Chapter 16 (Sections 207-223) of the Code of 1923. In this connection I wish to refer you to an opinion of this office rendered to the Judge of Probate of Henry County on August 24, 1928. (Biennial Report of Attorney General, 1926-1928, p. 716).

It is a matter of common practice for sheriffs or jailers to live in the jails. But this office has heretofore held that there is no provision for the furnishing or maintaining of that part of the jail.—**Biennial Report of Attorney General, 1924-1926, p. 282.**

The size of a county jail is governed by Sections 215 and 4877 of the Code of 1923, which provides that same must be of sufficient size to contain four apartments, one for white men, one for white women, one for colored men and one for colored women.

As above stated, I know of no authority, either expressed or implied, that would authorize the expenditure of public funds for constructing a building to be used for living quarters by the sheriff or jailer. Therefore, your inquiry must be answered in the negative. This is true although the food for the prisoners may be prepared in the new building and the new building may be situated next to the jail.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 6, 1936.

Mrs. Jesse W. Nunnelee, Chairman,
Board of Registrars, Montgomery County,
Montgomery, Alabama.

Registrars—Board of Registrars entitled to check all original papers, including those for years prior to 1935, if necessary, for the purposes of purging poll list.

Residence of one year in county required before one is entitled to register.

Election clerks in Probate Office subject to direction of Board of Registrars during seasons of purging poll list or registration in Montgomery County.

Opinion by Assistant Attorney General Small.

Dear Madam:

I have your letter of January 4, 1936, in which you request my opinion as follows:

"Can I make request of the Probate Judge to give into the hands of the Registrars the original registration papers for years as far back as 1915? We necessarily must have these papers, as the purging begins Monday and will go back for a number of years.

"Is it not the law that those who have been in the County two years prior to the next General Election are entitled to register?

"Must this purging be for the year 1935 or can it cover more years? There seems to be a prevailing idea among certain people that 1935 is the only year to be purged.

"Will it be permissable under the law for the Registrars to use the election clerk who has office in Probate Office, during seasons of purging or registration?"

In reply I wish to advise that in my opinion your first and fourth questions should be answered in the affirmative. I refer you to Section 2 of an Act of the 1931 Legislature, (Acts 1931, page 152) which controls the situation and is as follows:

"That in addition to the other duties to be performed under the direction of the Judges of Probate, it shall be the duty of the election clerks herein provided under the direction, supervision and instructions of said Judges of Probate to carefully examine the records of registered voters on file in said office and make a report to the Board of Registrars when said Board is in session, for the purpose of purging the registration list as provided by law, showing all names appearing on said list of registered voters who are dead or who have removed from the county and prepare all necessary notices to be issued by the Board of Registrars to all persons whose names appear on the list of registered voters who have removed from the county, and keep a docket of all such names stricken from the list of registered voters showing the reasons therefor, date of service of notice, and date of order of the Board of Registrars striking any name off of said list. It shall be the further duty of said election clerk to carefully check the list of all persons paying poll tax each year, and after carefully checking same with the list of registered voters, to prepare a list of qualified voters of said counties, as provided by law under the supervision and instructions of the Judges of Probate who shall certify to the correctness of same. The said election clerk shall be ex officio clerk of the Board of Registrars and under their supervision and instructions shall perform all duties required of him by said Board. It is the intention of this Act to provide for a correct list of qualified voters of said counties to be furnished the several election officers at each election or primary as now provided by law, and it shall be the duty of said election clerk to perform any and all services in this connection to carry into effect the purposes of this Act."

It will be seen that the purpose and intention of this Act is "to provide for a correct list of qualified voters of said county to be furnished the several election officers in each election or primary as now provided by law * * * ".

The provision of the general law requiring the Board of Registrars to purge poll lists is found in Section 392 of the Code of Alabama, 1923, as amended by the Act of 1927, at page 274, as follows:

> "Times for purging list of registration.—The board of registrars shall meet in each county on the first Monday in January, 1928, and every two years thereafter, for purging the registration list, and may continue in session one week. The names of those who have died, become non-residents of the State, become insane, and been so declared by inquisition of lunacy, or who have been convicted of any offense mentioned in Section 182 of the Constitution, since being registered, or otherwise disqualified as electors under the provision of the Constitution, and any names which may have been fraudulently entered on such list, shall be stricken from the registration list."

In my opinion, the Board of Registrars are entitled to all original registration papers with which to purge the poll list. The purpose of the Act as set out above may require checking poll list for a period of years prior to 1935, and it is my opinion that the authority of the Board of Registrars to check the poll list is broad enough to include lists prior to 1935 in order that the purpose and intention set out in the Act, supra, may be accomplished.

The Act further provides that "the election clerk shall be ex officio clerk of the Board of Registrars, **and under their supervision and instructions shall perform all duties required of him by said Board.**"

In my opinion, the answer to your second question should be in the affirmative. I refer you to Section 178 of the Constitution, which is as follows:

> "To entitle a person to vote at any election by the people, he shall have resided in the state at least two years, in the county one year, and in the precinct or ward three months, immediately preceding the election at which he offers to vote, and he shall have been duly registered as an elector, and shall have paid on or before the first day of February next preceding the date of the election at which he offers to vote, all poll taxes due from him for the year nineteen hundred and one, and for each subsequent year; provided, that any elector who, within three months next preceding the date of the election at which he offers to vote, has removed from one precinct or ward to another precinct or ward in the same county, incorporated town, or city, shall have the right to vote in the precinct or ward from which he has so removed, if he would have been entitled to vote in such precinct or ward but for such removal."

I further refer to Section 381 of the Code of Alabama, 1923, which enumerates the qualifications of persons entitled to register.

In reply to your third question, I wish to advise that in my opinion this purging should not be confined to the year 1935. (See answer to question one.)

I wish to further refer you to an opinion rendered to Hon. Wm. W. Hill, Judge of Probate, Montgomery County, under date of September 12, 1935, and the opinions of the Attorney General and authorities cited therein. I also call

your attention to an opinion under date of December 16, 1935, to Mrs. M. D. Holman, Chairman, Board of Registrars of Sumter County, copy of which I enclose you herewith.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 6, 1936.

Brigadier General Jno. C. Coleman,
The Adjutant General,
Montgomery, Alabama.

State Armory Commission—Power and authority of the Commission (Act No. 276 approved August 23, 1935).

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion dated December 30, 1935, as follows:

"The three National Guard units which are stationed in the City of Montgomery have made application to the First National Bank for a loan not to exceed six thousand dollars ($6,000.00), this money to be used as a contribution by the local units in sponsoring the erection of an armory on Madison Avenue. The armory site has been donated by the City of Montgomery.

"Colonel Baldwin has requested this office to furnish him with the following legal information from the Attorney General of Alabama:

"1. The legality of the Armory Commission;

2. Its power to acquire and dispose of property;

3. Its authority to borrow money and incur debts, and its responsibility for debts incurred;

4. Its power to sue or be sued, contract or be contracted with.

"It will be appreciated if you will let us have your opinion on these points as soon as possible."

Your first inquiry is general and, I assume that it will be satisfactorily answered by a general discussion of the power of the Legislature to create such corporation.

A statute enacted for the creation of a similar corporation was under attack in Alabama State Bridge Corporation vs. Smith, 217 Ala. 311, 116 So. 695. There the court said:

"The act as it now appears and the act as first proposed, notwithstanding its designation as an amendment in its first form, undertakes, and undertook in the first place, to create a public corporation for public purposes with which section 229 of the Constitution has nothing to do. The corporation authorized—and we take the authority to be in substance a command—is not intended as a private agency. It has no capital stock. No profit or other advantage is to be realized for the personal benefit of its members, who are officers of the state and ex officio mem-

bers of the corporation. It is intended to put into use and operation public funds and agencies of the state for the common benefit of the people of the state. It would construct bridges for the public use and, in the end, free to the public. It is an arm of the state, with none of the limitations, disabilities, or responsibilities that affect private corporations as such. The act creating the corporation was and is, so far as concerns the objections heretofore stated, a valid exercise of legislative power."

In my opinion, there is nothing in the act which appears to be in violation of any constitutional provision. I have not examined the legislative journals to ascertain if all constitutional requirements as to its enactment have been met. Until specific questions have been propounded pointing to alleged constitutional invalidities there is no occasion to pass upon these matters.

Particular attention is invited to the concurring opinion of Judge Bricken, sitting specially as a judge of the Supreme Court, disposing of the alleged invalidity of the Alabama Bridge Corporation Act under Section 213 of the Constitution. The Armory Commission Act (Section 5), construed in the light of the majority opinion, supra, does not authorize the creation of a "new debt" of the State within the meaning of Section 213 of the Constitution.

The said Act provides in part:

"Section 3. POWERS OF CORPORATION: Said Commission may in its corporate name sue and be sued, contract and be contracted with, acquire real and personal property by gift, purchase or condemnation; and may do all things and exercise all rights and powers reasonably necessary to carry out and perform the duties intended or required by this Act. * * * A majority of the members shall constitute a quorum for the consideration of business, but all contracts and agreements creating liabilities or indebtedness against, or requiring appropriations from, the Armory Fund, shall require the affirmative vote of a majority of all members of the Commission.

"Section 4. FINANCING OF ARMORIES: The Armory Commission of Alabama is hereby authorized, in addition to all other powers and authority granted herein, to finance or refinance any armory buildings or structures now in existence; to finance or refinance improvements to or additions to such armories already in existence; to finance the construction and maintenance of new or additional armories; and the Armory Commission of Alabama is hereby vested with the full authority and power to finance or refinance armories already in existence and to finance the construction of improvements or additions to such armories already in existence, and to finance the construction of such new or additional armories by or through any plan or plans of finance or refinance acceptable to or adopted by the said Armory Commission; and the said Armory Commission is authorized to provide for such financing or refinancing by the sale of bonds, by the matching of funds donated or loaned by any agency of the Federal Government, or by any other plan of finance or refinance acceptable to and adopted by the said Commission, it being intended herein to vest in the Armory Commission of Alabama, full, complete and exclusive authority, not inconsistent with the Constitution of Alabama, to select and put into effect any feasible plan of finance or refinance the said Commission may adopt."

Your second inquiry is answered by reference to Sections 7, 12 and 14 of the Act. Section 7 authorizes the Commission to acquire property. Sections

12 and 14 provide the authority and the procedure for the sale or lease of any of such property on the disbandment of National Guard Organizations using the same.

Your third inquiry involves a construction of Section 4 of the Act, which appears hereinabove.

Webster's new International dictionary defines the Verb "finance" to mean "to provide the capital for." The provisions of Section 4 are very comprehensive. In my opinion, the provision of the Act granting authority to the Commission to:

> "* * * provide for such financing or refinancing by the sale of bonds, by the matching of funds donated or loaned by any agency of the Federal Government, or by other plan of finance or refinance acceptable to and adopted by the said Commission, it being intended herein to vest in the Armory Commission of Alabama, full, complete and exclusive authority, not inconsistant with the Constitution of Alabama, to select and put into effect any feasible plan of finance or refinance the said Commission may adopt."

is sufficiently broad to include the power to mortgage or pledge its property as security for its obligations. Of course, the provision in this section for the issuance of bonds is a grant of authority to borrow money and to incur debts.

Your fourth inquiry is answered by reference to the first clause in Section 3 of the Act, which specifically grants to the Commission the power to sue and be sued and to contract and be contracted with.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 6, 1936.

Hon. G. H. Boyd,
Register Circuit Court,
Jefferson County,
Birmingham, Alabama.

Costs and fees in Juvenile Cases—Court costs in juvenile cases appealed to Circuit Court in Jefferson County, and dismissed for want of prosecution, held not payable by the state.

Opinion by Assistant Attorney General Small.

Dear Sir:

You request my opinion as follows:

"In Re: Cases Nos. 17400, 35319, 36659, 36848 and 36887.
"When you were in Birmingham yesterday afternoon I discussed with you cost bills in connection with the above cases of delinquent children which had been appealed from the Juvenile Court.

"The above cases were dismissed in this court for want of prosecution, and in the Decrees of Dismissal the costs were taxed against the Complainant, 'State of Alabama'."

"I am enclosing herewith the cost bills and kindly ask that you advise me the funds from which these bills should be paid."

In reply I wish to advise that, after careful consideration of these matters, I have concluded that these cases in Jefferson County are not payable by the State of Alabama.

Code of 1923, Section 3556 expressly excepts from the general provisions of the law those counties in which the legislature has provided, by a special Act, a court having jurisdiction over Juvenile cases.

The Acts of 1927, page 238, provide for the Juvenile Court in Jefferson County, but does not provide for the state to pay the costs. The State pays no costs that are not specifically provided for by statutes. I refer you to Greene County vs. Hale County, 61, Ala. 72, in which the court held:

"Neither the State nor the several counties thereof, are liable for costs incurred in the prosecution of offenders against the laws except to the extent, and in the manner, provided by statute."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 9, 1936.

Mrs. Gertrude P. Calloway,
Treasurer of Chilton County,
Clanton, Alabama.

1. Where warrant is drawn by order of the Commissioners Court of Chilton County, directed to the treasurer of Chilton County, signed by the Judge of Probate of Chilton County, who as such judge of probate, is president of the Court of County Commissioners, and there is sufficient funds of the class for the payment of such warrants, in the hands of the treasurer, it is her duty to pay such warrant.

2. In such a case as above stated, there is no duty on such treasurer to make any investigation of such claim, other than the facts shown on the face of the warrant, before paying the same, if the face of the warrant shows the nature of the claim, so as to show what class of funds it must be paid out of.

3. No responsibility rests on the treasurer of Chilton County to determine the validity or legality of the claim, when the warrant is regular on its face and shows on its face that it belongs to a class payable out of the county funds.

Opinion by Assistant Attorney General Bibb.

Dear Madam:

I wish to acknowledge receipt of your letter of July 19, 1935 as follows:

"For a little more than six years, I have served as Treasurer of Chilton County, having been elected in the General Election, under Act of Legislature, approved August 21st, 1923, Local Acts 1923, Page 78.

"During the period of time mentioned, there has been presented to me many warrants, drawn by order of Commissioners' Court of Chilton County, Alabama, and signed by the Probate Judge of this County di-

rected to me, ordering the payment of various sums out of the different funds in my possession as Treasurer. These Warrants are in the usual form and carry on their face that they are for certain items (in short and concisely stated), of course, but the purposes for which they are drawn are subject matters that the Commissioners' Court have authority to pay. Many such Warrants have been presented for payment and, of course, further Warrants of the same kind will be presented to me for payment in the future.

"Under said Act, under which I hold office, I wish to ask:

"(a) what are my duties as to the payment of such Warrants issued by the Commissioners' Court and presented to me, assuming, of course, that sufficient funds are in hand;

(b) is it my duty as such Treasurer to make any investigation of any claim before paying the same, other or beyond the facts shown on the face of the warrant;

(c) is it my duty to investigate or audit the original claim on which the warrant is based or the minutes of the Court relative thereto;

(d) what responsibility rests on me to determine the validity or legality of any claim where the Warrant is regular on its face?"

You will recall that by your letter of February 2, 1933 you requested an opinion upon the identical matter set out in your letter of July 19, 1935, which former request was answered by opinion of this office dated February 28, 1933, which opinion was in effect recalled by letter dater October 18, 1933. In view of the confusion arising by reason of this situation, and further by reason of the typographical error appearing in the report of the opinion dated February 28, 1933 as the same appears in the Biennial Report of the Attorney General, 1932-1934 at page 184, both of these opinions are hereby recalled and this opinion is substituted in lieu of them both.

To answer your question, I find it necessary to determine your status and duties since you first qualified and entered office.

Chilton County has all the time had a population of not more than fifty thousand according to the federal census. By Act No. 378, approved September 15, 1915, the office of County Treasurer in counties of less than fifty thousand population was abolished, not merely suspended.—State ex rel vs. Bugg, 196 Ala. 460. This act was codified in Code of Alabama, 1923, as Article 2 of Chapter 17 and its provisions, unchanged, so far as Chilton County is concerned, continue to be the law in Chilton County except as modified by Local Act No. 162, approved August 21, 1923. By Section 316 of the Code of Alabama there is made provision for designating a county depository in counties having a population of not more than fifty thousand according to the last proceding federal census. By Section 318 of the Code of Alabama the duties and liabilities of such depository is fixed. This section reads as follows:

"The bank or banks so designated as depositories of county funds shall be charged with all the duties and subject to the same liabilities in so far as the safe keeping and paying out of the funds of the several counties are concerned, as are now imposed by law on county treasurers."

Section 322 of the Code of Alabama provides for the designation of some individual to act as county treasurer if the Board of Revenue or Court of County Commissioners is unable to designate any depository for the county funds in their county etc.

Section 323 of the Code of Alabama limits the duties of the one appointed to act as county treasurer as follows:

> "All acts required by law to be performed by the County Treasurer, outside the receipts and disbursements of the county funds, shall be performed by the president of the Board of Revenue or Court of County Commissioners of the county."

Said section confines the duties of the one appointed to act as County Treasurer to the receipt, safekeeping and disbursements of the county's funds. The disbursements to be made by such treasurer on warrants drawn by the president of the Board of Revenue or Court of County Commissioners.

Such County Treasurer could hold office when appointed for only one year.—Jenkins vs.fl State ex rel Watkins, 219 Ala. 554.

Such was the status of a county treasurer, or one acting as county treasurer of Chilton County, prior to the passage of Local Act No. 162, approved August 21, 1923. The only parts of the local act that are constitutional and valid are Section 1, Section 2 and the proviso in Section 3. All the rest of the Act is clearly in contravention of Section 45 of the Constitution of Alabama when it provides:

> ". . . and no law shall be revived, amended or the provisions thereof extended or conferred by reference to its title only; but so much thereof as is revived, amended, extended, or conferred, shall be reenacted and published at length."

Said act clearly attempts to revive Chapter 12 of the Code of 1907 as to Chilton County, as it was prior to the passage of Act No. 378, approved September 15, 1915, by reference to its title only, and without reenacting the provisions desired and publishing them at length as required by the said section of the Constitution.

In my opinion, the only effect of said local act was to provide for the election of a county treasurer of Chilton County by the qualified electors of Chilton for a term of four years, instead of being appointed for a term of one year, under conditions named by the Court of County Commissioners, as provided by Section 322 of the Code of Alabama, the duties and obligations of the elected Treasurer remaining the same as provided by Act No. 378, approved September 15, 1915, for the one appointed to act as treasurer.

Under said last named act the duties of the one acting as county treasurer of Chilton County were: to receive and safely keep the funds of the county and pay them out on warrant signed by the president of the Court of County Commissioners.

In view of the foregoing, will say, in answer to question (a) that, in my opinion, when a warrant was drawn by order of the Commissioners' Court of Chilton County, directed to the Treasurer of Chilton County, and signed by the Judge of Probate of the County, who was president of the Commissioners' Court of Chilton County, and there was sufficient funds on hand for the payment of that class of warrants, it was your duty to pay it.

In answer to your question (b) will say that, in my opinion, it is not your duty, as treasurer of Chilton County to make any investigation of any claim before paying it, where the warrant is signed by the Judge of Probate, the President of the Court of County Commissioners, as required by law.

In answer to your question (c) will say that, in my opinion, the answer to question (b) also answers your question (c).

In answer to your question (d) will say that if you duly paid a warrant drawn by order of the Court of County Commissioners of Chilton County and signed by the Probate Judge of Chilton County, out of funds on hand subject to such a warrant no responsibility rests on you, as Treasurer of Chilton County, to determine the validity or legality of such claim. Section 323 of the Code of Alabama, in my opinion, relieves of such duty.

The valid portion of Local Act No. 162, approved August 21, 1923 did not affect Article 2 of Chapter 17 of the Code of Alabama, except that, it provided for the election, by the qualified electors of Chilton County for a term of four years of a Treasurer of Chilton County, instead of having one appointed by the Court of County Commissioners of Chilton to act as Treasurer for a term of one year, under conditions named in said Section 322 of the Code of Alabama. This provision of the Local Act was compulsory on the County and necessarily takes away from the Court of County Commissioners the duty and privilege of designating a county depository or of appointing one to act as Treasurer of Chilton County. All the provisions of said Article 2 as to the duties of the one acting as county treasurer remained unaffected by said local act, as said act in no way provides for or changes the duties of the treasurer or the method of paying the treasurer for service.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 9, 1936.

Hon. Frank M. Johnson,
Judge of Probate,
Winston County,
Double Springs, Alabama.

Schools—An audit of the office of the County Superintendent of Education of Winston County is not an expense of said office so as to be paid for out of School Funds, as provided by Local Act for Winston County. Such audit should be made and paid for according to Sections 735-752 of 1923 Code of Alabama.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of December 13, 1935, in which you state:

"The Superintendent of Education is having an audit made in his office. Who shall pay for same?

"In Local Acts of 1931, Page 304, 681 H. B. 1146-Posey, requires 'The County Board of Education of Winston County, Alabama, to pay out of the School Funds of said County all expense of the County Superintendent's Office.'

"In my opinion the audit of the Superintendent's Office should be paid out of the School Funds under above Act.

"I will thank you very much for your opinion on this subject."

I have carefully examined Act No. 681, H. B. 1146, approved July 30, 1931 (Local Acts 1931), which is as follows:

"Section One. That the County Board of Education of Winston County, Alabama, shall pay out of the School funds of said county all expense of the County Superintendent's Office, including stamps, stationary, office supplies, office equipment, and for taking the school census and that court of county commissioners shall be released from payment of same.

"Section Two. That this act shall go into effect immediately upon its approval by the Governor.

"Section Three. That all laws and parts of laws, both general or local, in conflict with the provisions of this act are hereby expressly repealed.

"Approved July 30, 1931."

It is my opinion that an audit of the County Superintendent's office is not an expense of said office, as contemplated in the Act, supra, as it is not a part of the County Superintendent's duties to audit his own office.

From the Act, supra, " * * * all expense of the County Superintendent's Office" means all expenses of that office which are ejusdem generis with stamps, stationery, office supplies, office equipment, and a school census.—**Eliasberg Bros. Mercantile Co. v. Grimes,** 204 Ala. 492, 86 So. 56; Martin v. State, 156 Ala. 89, 47 So. 104.

The audit of the Superintendent's office should be made in accordance with Chapter 24 (Sections 735-752) of the 1923 Code of Alabama, and paid for accordingly.—**Biennial Report of Attorney General, 1932-1934, at pages 159 and 625.**

Yours very truly,
A. A. CARMICHAEL
Attorney General.

January 9, 1936.

Hon. John S. Golson,
Probate Judge, Butler County,
Greenville, Alabama.

1. License Inspector—Commissioners Court may pay for citations, citation letter blank, blank record book and indexing and rubber stamp for License Inspector.

2. Elections—County to pay for costs of publishing of notice and election supplies.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of December 13, 1935, in which you request my opinion as follows:

"There has been submitted to the Commissioners Court of this County for payment a bill by The Butler County News, of Georgiana for citations, citation letter blanks, blank record book indexing and rubber stamp, in the amount of $18.45, for the License Inspector of this County. I shall appreciate it if you will advise whether it is proper for this bill to be paid by the County.

"There has also been submitted to the Commissioners Court by the Greenville Advocate a bill in the amount of $154.46, for publishing election notices of the special elections to be held and for election supplies. While the statute provides that the Sheriff shall give notice of the election, I do not find any authority for the County to pay for the publication of the notice. I shall appreciate it if you will advise whether this bill is proper to be paid by the County."

I call your attention to Section 353 (h) of the Revenue Bill which is as follows:

"(h) It shall be the duty of the Court of County Commissioners or other governing body of the several counties to supply the License Inspector with necessary **citation blanks** and **other necessary forms** to be paid for by the County."

It is my opinion that the County may properly pay for the items set out in your request. Authority is specifically given by Section 353 (h), supra, for payment by the county for the necessary citation blanks for the License Inspector. You will note that the section above cited also provides for payment by the county for "other necessary forms" for said Inspector. The courts have laid down the principle that "words are to be construed in their popular sense—the plain sense in which people generally understand them—unless it plainly appears from the writing in which they appear that they were intended to be employed in some other sense."

Harrison v. State, 102 Ala. 170, 15 So. 563
Crook v. Com. Ct. of Calhoun County, 144 Ala. 505,
Underwood Typewriter Co. v. Marengo Co. Bk., 203 Ala. 128, 82 So. 158.

In my opinion the natural import of the words "other necessary forms" warrants the inclusion of blank record books and indexing and rubber stamps, and it is my opinion that the county should pay for these articles.

Your second inquiry must be answered in the affirmative. I call your attention to an opinion of this office to the Hon. J. M. Gray, Chairman Walker County Commission, Jasper, Ala. dated July 13, 1935 in which it was held that the costs of publication of notice of elections is paid for by the counties. A copy of this opinion is inclosed for your information.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 9, 1936.

Mrs. Willie L. Mills,
Custodian of County Funds,
Washington County,
Chatom, Alabama.

Statutes—Act No. 122 approved June 12, 1935, construed, and held constitutional.

Opinion by Assistant Attorney General Rowe.

Dear Madam:

I have your request for opinion in which you state the following:

"I herewith enclose copy of local bill, (No. 122 H. B. 415), Washington County, Alabama. I am unable to clearly understand what my duties are under this bill. The bill appears to be very vague and indefinite. Will you please advise me.

"1st. Is this a legal bill?

"2nd. If so, then in what manner will fine and forfeiture claims be paid, shall the claims be audited and allowed by the Court of County Commissioners as provided by law for other claims or shall they be paid by me upon presentation.

"3rd. If payable out of the general funds of the county, are they preferred over all other claims. Please note that the caption of the bill does not provide for repealing general laws which define preferred claims."

Assuming that the bill in question was properly enacted, i. e. that all requirements regarding publication, reading, etc., have been complied with, your first inquiry must be answered in the affirmative.

I call your attention to the case of Mitchell v. Gorham, 162 So. 135, in which the court in sustaining the validity of a similar local act for Cullman County (Local Acts 1915, page 487, as amended by Local Acts, 1919, page 55), said:

"As a matter of fact both the general fund and the fine and forfeiture fund belonged to the county. Jackson County v. Derrick, 117 Ala. 348, 23 So. 193. * * * We think that in view of all the facts and circumstances in this case the merger of the fine and forfeiture fund into the general fund of the county and the fixing of the charges theretofore existing against said fund as a charge against the county is but a rearrangement of the county's fiscal policy, is cognate to the title to the act, and is valid as against the demurer."

See also Sanders vs. Commissioners Court of Elmore County, 117 Ala. 543; 23 So. 788; Board of Revenue of Jefferson County, vs. Kayser, 205 Ala. 289; 88 So. 19.

Claims formerly payable from the Fine and Forfeiture funds, which are now payable from the general fund, need not be audited and allowed by the Commissioners Court. There is nothing to "audit". The law fixes the amount of such claims and the Commissioners Court cannot increase or decrease the amounts so fixed.

Your third inquiry must receive a negative answer.

By the Local Act (Act No. 122, approved June 12, 1935) claims formerly payable from the Fine and Forfeiture Fund are given a "preference," but the Act is silent as to the order of preference. Section 231 of the Code of 1923 as several times amended by later enactments, provides for the order of payment of preferred claims against the County. Inasmuch as the local Act in question is silent as to the order of preference of the claims therein

dealt with, it is my opinion that they are inferior to all other preferred claims against the County which have a definite order of priority fixed by law.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.
January 9, 1936.

Hon. H. E. Williams,
Supt. of Education,
Lauderdale County,
Florence, Alabama.
Schools:

County Board of Education not authorized to pay Superintendent of Education from the bonus fund for expenses incurred in attending school meetings outside his county or making business trips outside his county in the interest of the school where Superintendent is elected under a local Act which provides for his compensation but does not provide for an expense account.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I beg to acknowledge receipt of your letter of September 23, 1935, in which you state:

"I have been forced to make a number of business trips to Montgomery in the interest of the schools during the past year. A number of such trips were made in connection with our efforts to secure government relief funds with which to extend our school term. I have also made several trips to Gadsden, Montgomery and other places conferring with architects, state superintendent of education and PWA engineer in an effort to have a PWA building program approved for the county. My actual expense for such trips during the past year has been approximately $100 and these trips were not in line with the regular duties of the county suprintendent of education under normal conditions."
You request my opinion:

"Can a county superintendent who is elected by popular vote under a local law and whose salary is fixed by a local law, be legally paid from the bonus fund for expense account incurred in attending school meetings called by the state superintendent of education or being sent on business trips in the interest of the schools outside of the county?"

Under the authority of **Woodward v. Beeland,** 123 So., I am of the opinion that in the absence of a provision in your local law authorizing the payment of an expense account, the County Superintendent is not authorized to be paid for his expenses.

While Section 294 of the 1927 School Code, providing:

"Bonus Fund Expended by County Board.—The funds so set apart for any County shall be expended by the County Board of Education as, in the opinion of the said County Board, will best promote the cause of Education in said county."

might be persuasive of the authority to pay the expenses of the Superintendent out of the bonus fund, yet under the authority of the Beeland case cited above, it would appear that the payment of the expenses of the County Superintendent is not authorized where the Acts specifically fix his salary and does not authorize the payment of expenses. I do not take it that the expression "will best promote the cause of education in said County" is an authority to the County Board to expend such funds in a manner not authorized by law.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 9, 1936.

Hon. G. H. Howard,
Judge of Probate,
Wetumpka, Ala.
County Commissioners Court—

No authority to pay for rental of bridge after rental contract has expired.

Opinion by Assistant Attorney General Small.

Dear Sir:

You request my opinion as follows:

"In 1924 the Counties of Elmore and Tallapoosa made a contract with Mt. Vernon-Woodberry Mills Inc. agreeing to pay to the said Mt. Vernon-Woodberry Mills Inc. the sum of $2,500.00 each per year for a period of ten years as rent on the bridge owned by the Mt. Vernon-Woodberry Mills, Inc. across the Tallapoosa River at Tallassee. The Company for said consideration agreed to keep the bridge open to the public free of toll.

"All payments were made up to the time the contract expired in January 1935. No contract has been signed since the expiration of the contract in January 1935. The Company is now asking the County to pay rent on the bridge for the time since the expiration of the contract at the same rate.

"Please advise us if Commissioners Court can legally pay rent on this bridge for the time since the expiration of the contract. An early reply will be appreciated."

In reply I wish to advise that in my opinion the County Commissioners have no legal right to pay rent on a bridge in the absence of a contract requiring such payments as authorized by law.

The authority under which your Court of Commissioners would be authorized to contract for a rental of the bridge in question is found in Section 6759, Code of 1923, which provides as follows:

"6759. Additional authority to bridges.—The courts of county commissioners and courts of like jurisdiction of the several counties of the State of Alabama are vested with the following authority in connection with and in addition to any authority, general or special, heretofore vested in them by law. For any on behalf of the respective counties

which they represent, courts of county commissioners and courts of like jurisdiction may contract for and take over, by lease or otherwise, the operation of bridges over navigable or other streams and may maintain the same as public highways and may expend county funds in the pursuance of such contracts, whether for the purpose of such leases or for the payment of the costs of maintenance or for liability accruing to such county, or to the owners or lessors of such bridges on account of accidents or injuries that may arise from such operations."

This authority contemplates a valid rental contract. Since under your statement of facts, your rental contract has expired and there is no general authority of law permitting the rental bridges by counties, in my opinion you could not legally pay the above named claim.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 9, 1936.

Hon. J. L. Clay,
Supt. of Education,
Marshall County,
Guntersville, Alabama.

Schools—Superintendents—

A. Traveling expenses of county Superintendents of Marshall County not authorized to be paid from Bonus Fund.

(1) If paid from the Bonus Fund, would become a charge against the official bond of the County Superintendent and his bondsmen.

B. Bonus fund consolidated with Minimum Program Fund by House Bill 945—Harrison, of 1935 Legislature.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of October 1, 1935 in which you inclose a copy of a resolution adopted by your County Board of Education. You ask the following questions:

"1. Is payment as provided in this resolution legal?

"2. If not, would such payment become a charge against the bond of the County Superintendent?

"3. Would the payment be charged against his bondsmen?

"4. If the payment of a specified amount is not legal would it be legal for the County Board of Education to provide for the payment from bonus fund, of the actual traveling expenses of the County Superintendent, allowing a specified number of cents per mile traveled in performance of his duties?"

The inclosed resolution is as follows:

"WHEREAS: It is necessary for the County Superintendent of Education to do considerable traveling in performance of the duties of his office, and

"WHEREAS: The evident intention of House Bill No. 31 of the 1931 Legislature, as interpreted by both the Representative and Senator from Marshall County at that time was to make it possible for the payment of all necessary expenses of the County Superintendent, including traveling expenses, and

"WHEREAS: Section 294 of the General School laws gives the County Board of Education authority to expend the local tax bonus fund as 'In the opinion of said County Board will best promote the cause of education in said County.'

"WHEREAS: In the opinion of the Marshall County Board of Education the cause of education in said county will be best promoted by the payment of the traveling expenses of the County Superintendent from the bonus fund; Therefore,

BE IT RESOLVED: That there is hereby appropriated out of the County bonus fund the sum of Eight hundred ($800.00) Dollars payable in 12 equal installments for the scholastic year 1935-36, for the purpose of paying the County Superintendent for expenses incurred in traveling over the county in the performance of his duties, and for expenses of attending State and National meetings of a nature related to the cause of public education."

In reply, I wish to advise that in my opinion your first inquiry should be answered in the negative. While the language of Section 294 of the School Code, concerning expenditures from the Bonus Fund is very broad, yet this section must be construed in connection with other provisions of the law governing the expenditure of public funds.

The local act controlling the compensation of the Superintendent of Education of Marshall County reads in part as follows:

"Section 4. Such County Superintendent of Education shall devote his or her entire time to the Public School business of Marshall County, Alabama, and shall receive as compensation the sum of Twenty-seven hundred dollars ($2700) per annum to be paid at the time and in the manner provided for by the general laws of this State for the payment of salaries of County Superintendents of Education. The County Board of Education of Marshall County, Alabama, shall determine the amount of office help to the County Superintendent of Education of the said County; the County Superintendent of Education of the said County shall select the help and the County Board of Education of Marshall County, Ala. shall fix the salaries of the said help and the same shall be paid at the time and in the manner provided in the general laws of the State of Alabama, for payment of such office help. That the County Board of Education is authorized to furnish under the general laws of this State the expenses of the Superintendent of Education and allowances for his office and shall be allowed by the County Board of Education as authorized under the general laws of Alabama."

This office has previously held that this act does not authorize the payment of traveling expenses of the County Superintendent of Education. I refer you to an opinion of the Attorney General rendered to Hon. V. M. Dickinson, Chairman Board of Education Marshall County, Guntersville, Alabama on February 20, 1935, copy of which is inclosed for your convenience.

The question of traveling expenses of Superintendents of Education who are elected under a local law has been very definitely settled by our Supreme Court in the case of Woodruff vs. Beeland, 127 So. 235. In this case, the court said:

> "An administrative board or other agency, the creature of legislation, has only the powers conferred by its creator. Every such board charged with the duty of devoting public funds to ends prescribed by law must point to a 'thus saith the law' for every disbursement.
>
> "Unless a given charge on such fund is expressly or impliedly authorized, it cannot be lawfully incurred."

The last paragraph of the above quotation is especially significant. In my judgment, the compensation fixed by the local law is the only amount for which authority may be pointed to for payment to the Superintendent of Education. It is true that the traveling expenses of the Superintendent may be included in the salary set by the County Board, as is pointed out by the court in the above quotation, but unless the local law governing the compensation contract of the County Superintendent authorizes a traveling expense account to be paid to the Superintendent, there could be no authority permitting this officer to receive such payment, from the Bonus Fund or from any other source.

The argument may be presented, that the language of Section 294 of the School Code is broad enough to authorize the payment of traveling expenses of the County Superintendent to State and National Meetings. In my opinion, this is not true. It is evident that the Bonus Fund is primarily intended to provide for emergencies that may arise in the actual promotion of the interest of Education in the county that could not be contemplated by any definite legal provision.

The fact that the Superintendent may be greatly benefitted by attending State and National Conventions, and the cause of education in the county therefore advanced, is not here questioned. Neither does this fact enter into the consideration of the instant case. The primary question for decision here is whether or not the Superintendent's traveling expenses both in the county, in the performance of regular duties encumbent upon his office, and/or the traveling expenses to and from State and National meetings may lawfully be paid from the Bonus Fund. These expenses must be considered either as incurred on official business for the County Board of Education, or they are incurred on or about business private in its nature. If they may be considered as a part of official business, then they are incurred in the exercise of the duties incident to the office. The Supreme Court has repeatedly held that a public officer takes his office "cum onere" and cannot complain that the compensation is not sufficient for the duties imposed by the office itself. I refer you to the cases of Mobile County vs. Williams 61 So. 963, 180 Ala. 639 and McElderry vs. Abercrombie, 104 So. 671, 213 Ala. 289.

If these expenses are considered as private, then there is no authority of law for their payment, there being no authority of law for payment of public funds for private purposes.

In my judgment, your second and third questions should be answered in the affirmative.

Your fourth question is answered in the answer to your first question.

The questions answered above in this opinion contemplate a situation arising before September 2, 1935.

The Bonus Fund was consolidated with the Minimum Program Fund by the 1935 Legislature in House Bill No. 945—Harrison, approved by the Governor on September 2, 1935, which provides in part as follows:

"Section 3. MINIMUM PROGRAM FUND.—That in addition to all other moneys appropriated for the public elementary and high schools of the State, there is hereby appropriated to the State Board of Education out of any funds in the treasury not otherwise appropriated for the fiscal years ending September 30, 1936, September 30, 1937, September 30, 1938, and September 30, 1939, the following sums which in accordance with the statutes and the regulations of the State Board of Education relating to the expenditures of such fund, shall be used for providing a minimum term and for the equalization of educational opportunity in the public schools of the State: a. The following funds and appropriations are hereby consolidated with and made a part of the minimum program fund and henceforth shall be included as a part of the minimum program appropriation: (1) The appropriation previously known as the Equalization Fund amounting to $900,000 annually. (2) The appropriation previously known as the Attendance Fund, amounting to $850,000 annually. (3) The appropriation previously known as the High School Education Fund, amounting to $411,000 annually. (4) The appropriation previously known as the County High School Fund, amounting to $301,-500 annually. (5) **The appropriation previously known as the Bonus School Fund, amounting to $268,000** annually. (6) The appropriation previously known as the Rural Schoolhouse Fund, amounting to $134,000 annually. (7) The appropriation previously known as the Rural School Library Fund, amounting to $17,500 annually. b. An additional appropriation amounting to $3,160,516. c. Any other appropriations or funds which may be designated by the Legislature as a part of the minimum program fund."

It will be observed that the effect of this Act is to remove the Bonus Fund from the control of the County Board of Education and to include the appropriation formerly allotted to the "Bonus Fund" in the present "Minimum Program Fund." Under these circumstances, it is my opinion that no payments for any purposes may be made from the "Bonus Fund" upon the order of the County Board of Education for the period set out in this Act.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 9, 1936.

Hon. W. G. Little,
Judge of Probate,
Sumter County,
Livingston, Alabama.

License and Taxation—

Record Filing Tax—deed and mortgage taxes (Schedule 41 and subsection (c) of Schedule 94 of Section 348 of Revenue Act of 1935) should be collected on deed reserving vendor's lien when the same is offered for record.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for an opinion dated December 20, 1935, as follows:

"I have had filed in my office a paper that puzzles me as to the right amount of tax to charge on it. In substance this paper is as follows:

"'A' owns a piece of property and has made a deed to it to 'B'. The deed stipulates that $5.00 is the present consideration, but that vendee agrees to give vendor fifteen promissory notes for $400.00 each, one to be paid each year from now until 1950. The deed contains a vendor's lien and gives vendor all the right of a mortgagee. What deed tax should be charged? Also what mortgage tax?"

In my opinion, both the deed tax and the mortgage tax must be collected on the instrument offered for record, but upon different valuations. Schedule 46 of Section 348 of the Revenue Act of 1935 provides in part:

"No deed, bill of sale or other instrument of like character which conveys any real or personal property within this state, or which conveys any interest in any such property, * * * shall not be received for record unless the following privilege or license tax shall have been paid upon such instrument before the same is offered for record to-wit: (here follows the schedules for the imposition of the tax.) Provided that only the value in excess of any mortgages or vendors lien upon any property within this State on which the mortgage tax has been paid, shall be taxable under this Schedule."

Subsection (c) of Schedule 94 of Section 348 of the Revenue Act of 1935, provides:

"That when any deed is filed for record which recites that part of the purchase money is unpaid, such deed to the extent of such unpaid balance shall be held and treated as a mortgage, and the mortgage tax shall be collected by the Judge of Probate in addition to the tax for recording the instrument as a deed before recording the same, unless said balance of purchase money shall be secured by mortgage or deed trust which has already been filed for record, and the tax thereon paid, and the fact of such prior payment shall be endorsed on the deed. When any such deed is recorded and the tax thereon is paid, and thereafter a mortgage securing the debt is filed for record, the same shall be admitted to record without the payment of the mortgage tax and the fact of such prior payment shall be endorsed on the deed."

I understand from your letter of inquiry that the property conveyed is not worth more than the recited purchase price.

So that, the deed tax in the sum of fifty cents should be collected on a valuation of $500.00 or less (which is the value of the property in excess of the vendor's lien) and the mortgage tax in the sum of $9.00 should be collected on the valuation of $6000.00 (which is the unpaid balance of the purchase price) before the instrument is received for record.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 9, 1936.

Hon. S. P. Poyner,
Judge of Probate,
Houston County,
Dothan, Alabama.

Licenses—No license due for the solicitation of subscriptions for magazines under facts stated.

Opinion by Assistant Attorney General Small.

Dear Sir:

You request my opinion as follows:

"Mr. N. B. DeHart employed by Crowell Publishing Company, together with several men under him, are selling subscriptions to magazines—American Magazine, Collier's Weekly, Woman's Home Companion, Country Home, Needle Craft and Woman's World. The chief combination they are selling is a subscription for one year, Woman's World; one year, Needle Craft; five years, Country Home at the price of $3.25. When this combination is purchased at this price they give free, and without any charge whatever, an aluminum waterless cooker, which cooker is given at the time the subscription is procured. The aluminum cooker is the property of Crowell Publishing Company, which they buy in large lots, perhaps 100,000 at a time. They do not sell any of these cookers to any one at any price, but they do sell the subscriptions to the magazines and then give free without any charge, the cooker. The subscriptions to the magazines are sold for one price, whether the cooker is given with the subscription or not. We are enclosing one of the blank receipts issued by Mr. DeHart to the customer.

"Please advise me if under these circumstances in your opinion, Mr. DeHart, or any of his agents are liable for any license in Alabama, or whether or not they are engaged in interstate commerce and not subject to any license."

Under the exact facts stated in your letter, it is my opinion that no license is due in the above cases.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 9, 1936.

Hon. W. W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama,

License and Taxation—Record filing tax.

(1) Under Schedule 46 and subsection (c), Schedule 94 of Section 348 of the Revenue Act of 1935, Probate Judge has the duty and authority to make inquiry as to the real consideration of the instrument to the end that the proper filing tax may be collected.

(2) In the event A buys property from B and pays $2000 cash and executes mortgage for $3000 and both instruments are offered for record,

deed tax should be collected on $2000 valuation and mortgage tax on $3000 valuation.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"Will you please render an opinion in reference to the collection of a deed tax where a mortgage is involved, as follows?

"1. A buys a piece of property from B for $5000.00. A pays B $2000.00 cash, and gives a mortgage for the balance of $3000.00. Should this office charge full deed tax on $5000.00 and also a mortgage tax on $3000.00?

"2. A buys a piece of property from B for $5000.00 cash, but to make this cash payment he borrows $3000.00 from C, and gives C a mortgage on the property that he is purchasing. The mortgage and deed are filed in this office simultaneously. Do we collect the full deed tax, or do we allow credit for the amount of the mortgage on this transaction?"

In my opinion your first inquiry should be answered in the negative.

Subsection (c) of Schedule 123 of Section 334 of the Revenue Compilation of 1929, which is carried forward as subsection (c) of Schedule 94 of Section 348 of the Revenue Act of 1935, provides:

"That when any deed is filed for record which recites that part of the purchase money is unpaid, such deed to the extent of such unpaid balance shall be held and treated as a mortgage, and the mortgage tax shall be collected by the Judge of Probate in addition to the Tax for recording the instrument as a deed before recording the same, unless said balance of purchase money shall be secured by mortgage or deed trust which has already been filed for record, and the tax thereon paid, and the fact of such prior payment shall be endorsed on the deed. When any such deed is recorded and the tax thereon is paid, and thereafter a mortgage securing the debt is filed for record, the same shall be admitted to record without the payment of the mortgage tax and the fact of such prior payment shall be endorsed on the deed."

Schedule 46 of Section 348 of the Revenue Act of 1935 provides in part:

"Schedule 46. * * * No deed, bill of sale or other instrument of like character which conveys any real or personal property within this state, or which conveys any interest in any such property, * * * shall not be received for record unless the following privilege or license tax shall have been paid upon such instrument before the same is offered for record to-wit: (here follows the schedules for the imposition of the tax). Provided that only the value in excess of any mortgages or vendors lien upon any property within this State on which the mortgage tax has been paid, shall be taxable under this Schedule."

In an opinion of this office appearing at page 195 et. seq. of Biennial Report of Attorney General 1922-24, it was held that "neither the recited considerations of the conveyance nor the purposes for which it was executed, determines the liability of the instrument to the tax." In other words, the rule has been laid down that the **actual transaction** and not that **recited in the instrument,** is the true basis for determining the liability to the tax.

A literal construction of the first quoted provision of law might lead to the conclusion that, unless the instrument offered for record, actually recites that a part of the purchase money is unpaid, the tax should be levied upon the full amount of the recited consideration for the deed, and also upon a mortgage securing a part of the purchase price so recited in the deed, when the latter is offered for record. But literal construction is not always a safe rule and guide in determining the legislative intention. Abramson vs. Hard, 155 So. 590, Headnote 5 and cases therein cited.

It is the rule generally that, as between the parties to a conveyance, in every sale of lands when the purchase money is not paid in full, the law presumes reservation of a vendor's lien unless the terms of the contract of sale or the attendant circumstances of the transaction satisfactorily show that it was purposely excluded. Dixie Co. vs. Benson, 202 Ala. 149, 79 So. 615.

And in Kelley vs. Karsner, 81 Ala. 500, 2 So. 164 the court said:

> "The vendor's lien does not depend on any special agreement nor specific intention of the parties. It arises on equitable principles from the contract of sale and a conveyance, and a refusal or failure to pay the agreed price. While the settled rule is, that recital of payment in the deed does not waive, nor destroy the lien, which equity creates for the protection of the vendor, such recital is prima facie evidence of payment, requiring complainant to explain or disprove."

This office recently held that, when a conveyance of personal property to secure a debt was filed for record, which showed that there was some consideration other than that actually recited, it is the duty and the right of the Probate Judge to make inquiry to ascertain the true consideration of the conveyance for the purpose of collecting the filing tax. See Opinions of Attorney General, Office Edition, Book 5-A, page 281, a copy of which is enclosed herewith, Cf. Long v. Jasper Land Co., 217 Ala. 593, 117 So. 210.

From a careful consideration of the two schedules pertaining to the levy and collection of the tax, it is my opinion that the Legislature intended that the provisions of subsection (c), quoted supra, should be applied whether or not the instrument offered for record recites that a part of the purchase price is unpaid, if in fact a part of such purchase price is unpaid, and that under Schedule 46, supra, only the value in excess of the mortgage or vendor's lien upon which the mortgage tax has been paid, is taxable.

Your second inquiry must be answered in the negative. The transactions are separate and distinct under the facts stated in your second inquiry. See Biennial Report of the Attorney General 1928-1930, page 875.

Yours Very truly,
A. A. CARMICHAEL,
Attorney General.

January 10, 1936.

Hon. P. A. Nash,
Deputy Circuit Solicitor,
Blount County,
Oneonta, Alabama.

Inferior Court of Blount County has jurisdiction as Juvenile Court under Acts 1932, page 276, and Probate Court of said County has no such jurisdiction.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"There was a local act passed by the Legislature of Alabama and approved July 17, 1931, Local Acts 1931, at page 228, establishing an Inferior Court for Blount County, with jurisdiction concurrent with Justice of the Peace and extending over the entire county.

"Legislature of Alabama passed an Act which was approved July 22, 1931, Acts 1931 at page 637, transferring the jurisdiction of Juvenile courts in all Counties of Alabama having a population of 35,000 or less according to the last or any subsequent federal census to County Inferior Courts. Blount County has a population of less than 35,000.

"The question is, 'Does the Inferior Court of Blount County have the jurisdiction of the Juvenile Courts, or is such jurisdiction still in the Probate Judge?"

In my opinion the Inferior Court of Blount County has jurisdiction of the Juvenile Court actions and proceedings and the Probate Court has no such jurisdiction under Chapter 100 of the Code. Your attention is invited to the amendment to Acts of 1931, p. 637, which appears at Acts 1932, page 276. However, the amendment does not affect Blount County inasmuch as the population of the county, according to the last Federal Census is over 25,000 and under 35,000.

The last cited Act provides that:

"The jurisdiction of juvenile courts in all counties of this State having a population of thirty-five thousand or less according to the last or any subsequent Federal Census, be and the same is hereby transferred to and vested in county inferior courts, and the judges thereof, which now are, have been, or may hereafter be, established in any such counties; provided that said Act shall not apply to any county of less than twenty-five thousand inhabitants according to the last or any subsequent Federal Census * * *".

The Inferior Court of Blount is such an "Inferior Court" as the statute, supra, contemplates.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 10, 1936.

Hon. C. E. Corprew,
Sheriff, Tallapoosa County,
Dadeville, Alabama.

Sheriffs—Costs in Juvenile Cases.

Sheriff entitled to same costs in juvenile cases as other courts as provided for in Section 3558 Code of 1923.

Opinion by Assistant Attorney General Small.

Dear Sir:

You request my opinion as follows:

"In Juvenile Cases, where affidavits and warrants are issued and served in regular form by the Sheriff as in other cases and the parties found guilty in Juvenile Court and sent to Reform School, or in case they are acquitted, in what way does the Sheriff collect his cost?"

In reply, I wish to advise that in my opinion, the Sheriff is entitled to collect his costs, under the facts above stated, as provided in Section 3558, Code of 1923, which is as follows:

"Officers serving process, etc., under juvenile courts; costs and fees of.—All officers serving process from juvenile courts, or feeding prisoners committed by, or held for or under such courts, shall receive the same costs, fees, and compensation payable in the same manner and from the same source as are now allowed and paid for like services with respect to process issued by the circuit courts or courts of like jurisdiction, and for feeding prisoners committed by circuit courts or courts of like jurisdiction."

I wish to further refer you to the following opinions of the Attorney General:

Opinion to Sheriff of Chilton County, on June 12, 1935.

Opinion to Judge of Probate, Jackson County, October 14, 1929, Vol. 15, page 53 Office Edition, copy of which is enclosed for your convenience.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 10, 1936.

Hon. J. A. Keller,
State Superintendent of Education,
CAPITOL.

Schools—County Boards of Education must appoint custodian of county School Funds under the provisions of Act No.. 507, S. B. 424, approved September 13, 1935. Only the provisions of Bains Bond Act (Acts 1933, p. 203) which are in conflict with Act No. 507, supra, are repealed.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of December 17, 1935, which is as follows:

"Will you please let me have as early as convenient your interpretation of Section 1, of Act 507, S. 424, approved September 13, 1935, in view of Sections 94 and 295-300, School Code of 1927, and Sections 2, 15½, 16 19, 20, and 21 of H. B. 344, Bains, approved April 21, 1933.

"The question arises whether Section 94 of the School Code of 1907 as amended September 13, 1935, makes it the duty of each County Board of Education to immediately designate a **Custodian of County School Funds** to displace the present official serving in that capacity

with the same functions and duties under the designation **County Treasurer of School Funds;** or, does the law contemplate that as the terms and bonds of the present **County Treasurers of School Funds** expire it becomes the duty of **County Boards of Education** to designate a **Custodian of School Funds** and fix the amount of his official bond subject to approval of the State Board of Education through its excutive officer, and State Superintendent of Education.

"Will you further advise me whether the provisions of H. B. 344, Bains, approved April 21, 1933, relating to the filing of official bonds of **County Treasurers of School Funds** govern the filing of official bonds of the **Custodian of County School Funds** in so far as these provisions are not in conflict with Section 1 of Act 507 S. 424, approved September 13, 1935."

In answer to your first inquiry, I am of the opinion that it is the duty of each County Board of Education to immediately designate a custodian of County School Funds to displace the present County Treasurer of School Funds under the provision of Section 1 of Act No. 507, S. B. 424, approved September 13, 1935, which amended Section 94 of the School Code of 1927. Said section specifically provides " that the County Board of Education **shall** appoint a custodian of public school funds of the county." Section 11 of said Act provides: "That all laws and parts of laws in conflict with the provisions of this Act are hereby repealed." The above proviso, in my opinion, shows a legislative intent that the County Treasurer of School Funds be immediately replaced by the Custodian of County School Funds. However, I see no objection in the County Board of Education appointing the County Treasurer of School Funds as Custodian of County School Funds and making use of the same bonds with proper amendments and approval to comply with the provisions of Section 1 of Act No. 507, S. B. 424, approved September 13, 1935, supra.

I am of the opinion that your second inquiry should be answered in the affirmative. The 1935 Act, supra, providing for the Custodian of County School Funds only repealed laws or parts of laws in conflict (See Section 11). It did not repeal any other provisions of former laws. Therefore, the provisions of the so-called "Bains Bond Act," (Act 1933 p. 203) not in conflict with the 1935 Act, supra, were not repealed. The 1935 Act, supra, merely created the office of Custodian of County School Funds in lieu of the County Treasurer of School Funds. The functions and duties of each office are practically the same. The 1935 Act was silent as to some functions and duties necessary to the office in question. It is necessary to refer to the "Bains Bond Act," supra, to give the 1935 Act, supra, a full field of operation.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 11, 1936.

Hon. J. L. Potts, Sheriff,
Lauderdale County,
Florence, Alabama.

The Sheriff of Lauderdale County serving citation on bondsmen on criminal forfeitures is entitled to $1.50, the same fee provided for such service in the Circuit Court.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of October 28, 1935, in which you request my opinion as follows:

"In regard to Sheriff's fees: In serving notices on bondsmen when the Defendant fails to appear in court, should we charge $1.50 for serving these Scire Facias in Law and Equity Court the same as we do in the Circuit Court."

I note the Act creating the law in Equity Court passed over the Governor's veto, May 29, 1931, (Local Acts, 1931, p. 72), and that Section 14 of said Act provides as to the Sheriff's fees as follows:

"Section 14. The Sheriff of Lauderdale County shall in person, or by a deputy or deputies approved by said Court, be required to attend upon the said Court, and preserve order and execute all process and perform such other duties in all respects as in the Circuit Court and for such services of attending such court the sheriff shall receive $3.00 per day to be paid out of the County Treasury for one deputy. The Sheriff shall receive the same fees for executing the processes of this court as provided by law for the execution of the same processes in the Circuit Court or in the Justice of the Peace Court, and shall be collected in the same way as is now or may hereafter be provided by law."

For serving notice on bondsmen in forfeiture cases, I am of the opinion you should receive the same fee as is provided for such service of other processes in the Circuit Court under Section 14 of said Act, supra.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 11, 1936.

Hon. R. E. King,
Tax Collector,
Mobile, Alabama.

Tax Collectors. Mobile County. Acts No. 241 and 242 approved Aug. 15, 1935, construed:

(1) Provision authorizing deduction by Tax Collector from taxes collected sum sufficient to pay his and the assessors' salaries and the salaries of their assistants held valid.

(2) No commissions upon general, special or school taxes are collectible, either for the assessor or collector.

(3) "Fees" provided by law should be collected and paid into the general fund of the county treasury.

(4) Tax Collector is authorized to retain out of taxes collected sufficient sum to pay the annual salaries payable to him, to the assessor and their assistants.

(5) The Collector should retain the commissions provided by law for the assessing and collecting city taxes on motor vehicles when remitting

such taxes to the city. Such commissions are payable into the County Treasury.

(6) The salary of the Assessor and Collector as fixed in said Acts No. 241 and 242 is all the compensation that either officer may be paid by reason of his office.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter in which you state:

"On August 15th, 1935, the Governor approved a local bill putting the Tax Collector of Mobile County on a salary basis instead of on the fee system, and as there has been several questions come up on this bill, please give me an opinion on the following questions. This bill is known as House Bill No. 401, by Mr. Staples.

"The first question is covered by Section No. 4 which declares that no commission shall be charged or collected from any account in Mobile County. Please advise me if I am right in not deducting the commissions on the State, County and School funds, before making remittances to the several accounts. If I am wrong in not deducting these commissions, and I should deduct them, please advise me to what account the surplus, after the salaries have been deducted is to be applied to. From the wording of this Section, the only remittance the General Fund of Mobile County is entitled to other than the regular remittance, is the Fifty Cent fees.

"The second question refers to Section No. 1, wherein the Tax Collector is to pay for all help in twelve monthly payments. This Section, on its face, is very plain, however, in application it is very confusing due to the fact that during the months of August and September the work is mostly, in fact, practically all clerical work and no collections, or not enough collections are made to make the necessary payments for salaries. Will I under this condition, be permitted to make an arbitrary deduction from other months to care for these two months.

"Also in this Section it reads that this bill does away with all emoluments other than salary. Does this also include the commission allowed the Tax Collector for the handling of Automobiles for municipalities?

"Under the old commission form of payment, the Tax Collector had to pay the premiums on the bonds covering the bonds of all his deputies. Under the Salary Bill, does the Tax Collector of the County have to pay this premium?

"Under House Bill No. 473, by Mr. Taylor of Mobile, the same situation practically exists for the Tax Assessor, and I will appreciate it very much if you will please give these questions your very earliest attention, in order that I may know exactly how to handle them in order that I may keep from having any difficulties, both from an accounting end and from my official bond."

You also attach opinion of Pillans, Cowley & Gresham, which I have given careful consideration.

The preliminary question to be answered is the authority of the Legislature to authorize the Tax Collector to "retain out of the taxes collected by

him the amount of his salary and the amount of the salaries of his assistants". (Sec. 4 of said Act No. 241, H. B. 404 Staples, approved Aug. 15, 1935).

In the early case of Shaver v. Robinson, 59 Ala. 195, the Supreme Court held in response to the contention that the poll tax was not subject to deduction by payment of the tax collector's commissions, that "it was not contemplated that it should be relieved of the common burden of all revenue raised under our statutes—the expense of its own assessment and collection". The principle laid down in this case has been followed uniformly since.

See Jefferson County v. City of Birmingham, 221 Ala. 476 (129 So. 48)
City of Birmingham v. So. Express Co., 164 Ala. 529 (51 So. 159)
State v. Jefferson Co., 17 Ala. App. 460, 86 So. 88 (2d), 204 Ala. 393, 86 So. 89.

The principle declared by these cases is that taxes can be charged with the expenses of assessment and collection.

By constitutional amendment the Legislature is authorized, subject to the provisions of Section 281 of the constitution "to fix, regulate and alter the costs, charges of courts' fees, commissioners' allowances or salaries to be charged or received" by certain county officers of Mobile County, including the Tax Collector and Tax Assessor. Acts 1932, p. 83.

The Acts fixing the salary of the Tax Collector and Tax Assessor were presumably upon the authority of this amendment.

Section 1 of Act No. 241 fixes the the salary of the Tax Assessor at $6000.00 per annum and provides:

> "This salary shall be in lieu of all other compensation, fees, commissions, perquisites and emoluments for the performance of the duties of his office or for any act or service charged for by him, growing out of the performance of his official duties or connected with the operation or conduct of his office."

Section 2 authorizes the employment of Assistants and fixes the maximum compensation which may be paid them.

Section 3 provides:

> "The Tax Collector may retain, out of the taxes collected by him, the amount of his salary and the amount of the salaries of his assistants. The amount of such salaries of the tax collector and his assistants, shall be charged against, borne and retained, respectively, by, from and out of, the taxes collected for account of the State of Alabama, the taxes collected for account of the County of Mobile, and the taxes collected for account of the Board of School Commissioners of Mobile County, in the ratio that the amounts collected respectively for the State, for the County of Mobile , and for the Board of School Commissioners of Mobile County, bear to the total amount of taxes collected."

As disclosed by the Act the general system of commissions ordinarily payable to assessors and collectors set up by Sections 3040 and 3048 of the Code of 1923 is abolished as to Mobile County and instead the Tax Collector is authorized to retain out of the taxes collected, a sum sufficient to pay his own salary and that of his Assistants and also the salary of the Assessor and his Assistants (See Sec. 3 Act No. 242, approved August 15, 1935).

While this method of payment is a novel one, I am persuaded upon the authority of Shaver vfl Robinson, supra, and the supporting cases that this method of payment is but another manner of making the taxes bear the expense of assessment and collection. The two Acts very carefully proportion such expense according to the amount of taxes collected by each agency receiving the same. This emphasizes the thought in the legislative mind, I believe, that the expense of collection is a proper charge upon the taxes.

Answering specifically your questions, I advise:

(1) That Sec. 4 of Act No. 241 and Sec. 4 of Act No. 242 specifically provide that the commissions provided by Section 3048 and 3040 of the Code are inapplicable to Mobile County "and said commissions shall not be charged or collected in Mobile County."

Under the foregoing language, I cannot but hold that neither the Tax Collector nor the Assessor is authorized to charge commissions upon assessments or collections, upon "general and special and school taxes."

There are certain specific fees accruing to the Tax Collector and Tax Assessor for the performance of certain specified duties. These are not commissions and are declared to be unchanged. These should be collected and remitted to the general fund of the county as is provided by Section 6 of both Acts.

In your next question you ask if you are authorized to retain out of taxes collected a sufficient sum to pay the salaries of you and your Assistants and of the Assessor and his Assistants, which will accrue during the latter months of the fiscal year, when few if any taxes are paid,—this in view of the requirement of equal monthly payments in both Acts.

These provisions are to be construed in a reasonable manner and in the light of the legislative intent as found in the whole Act.

Both you and the Assessor are paid a fixed sum per annum. This cannot be reduced. There is a maximum fixed for the Assistant on an **annual** basis. The assessment and collection of taxes covers, in various phases, the entire year. I do not believe the legislature intended that you remit all the money in your hands on a certain date and in the absence of further collections, you, the Assessor and both of your Assistants go unpaid. The expense being annual, it appears reasonable that you retain out of taxes collected a sufficient amount to pay these expenses for the balance of the fiscal year.

The next question applies to the right of the Collector to retain commissions on city taxes on motor vehicles. Section 4 of Act No. 241 provides:

> "The provisions of law touching the commissions of tax collectors for collecting the general and special and school taxes, set out in Section 3048 of the Code of Alabama of 1923 and in Section 204 of the Compilation of the Revenue Laws of Alabama of 1929, are hereby declared inapplicable to Mobile County and to the Tax Collector of Mobile County, and the said commissions shall not be charged or collected in Mobile County. The general statutory system of Alabama touching fees, court costs and penalties with reference to the collection of taxes, remains unchanged by this statute, except as herein specifically provided."

It will be noted that by this Act no commissions are to be charged on "general and special and school taxes set out in Section 3048 of the Code of Alabama of 1923". While Section 4 of the Assessor's Act (Act No. 242) does not specifically state "general, special and school taxes" as does Act No. 241, it does declare that "the commissions set out in Section 3040 of the Code of Alabama of 1923", shall not be collected.

Both Section 3040 and 3048 cover the same subject-matter, to wit, commissions on general, special and school taxes, hence the two Acts while slightly differently expressed relate to commissions on the same types of taxes..

The provision for commissions on city taxes on motor vehicles was made by Section 18, Acts 1927, p. 139 (1929 Comp. Sec. 20, p. 214) and appears in the 1935 Revenue Act as Schedule 158.12 subdivision D. Sections 3040 and 3048 of the Code appear therein as Sections 22 and 161 respectively.

It appears that Acts Nos. 241 and 242 are silent as to the collection of commissions on city taxes on motor vehicles, and therefore the provision requiring their collection remains, and it is the duty of the collector to retain such commissions when remitting such taxes to the city.

Are such commissions to be retained by the officers or are they paid into the County Treasury. From the terms of Section 1, I am of the opinion that the salary there fixed all that can be paid to either of the officers. This provision:

> "This salary shall be in lieu of all other compensation, fees, commismissions, perquisites and emoluments for the performance of the duties of his office or for any act or service charged for by him, growing out of the performance of his official duties or connected with the operation or conduct of his office."

appearing both Acts permit no other construction.

It would seem that such taxes should bear their proportion of the expense, but Section 3 above quoted specifically provides for such allocation and by the rule of inclusio unius est exclusio alterius, city taxes on motor vehicles are excluded.

While Section 6 uses the term "fees", the intent appears to be that any compensation payable to the Assessor or Collector for which no specific provision had been made should be paid into the County Treasury.

In the absence of specific statutory authority, and I have been unable to find any, the bonds of the Assistants to the Collector and Assessor are not payable by the County.

Yours very truly
A. A. CARMICHAEL,
Attorney General.

January 11, 1936.

Hon. G. H. Howard,
Judge of Probate,
Wetumpka, Alabama.

Elmore County—Act No. 227, approved July 17, 1935, providing for ex officio fees, and increased compensation of the sheriff; and providing for the appointment and compensation of an additional deputy sheriff, is

violative of Sections 45, 96, sub-section 24 of Section 104 and Section 281 of the Constitution.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion dated August 7, 1935, as follows:

"Please advise me your opinion as to constitutionality and validity of house bill No. 617 by Mr. Sanford providing for one extra deputy sheriff for Elmore County, and for payment of $100.00 per month to the sheriff of Elmore County for patroling lakes, dance halls and fishing camps in Elmore County. Would payments made by the County as provided under this act be a legal disbursement by the County?"

In my opinion, the entire act is invalid for the reason that there are embraced in both the title and the body of the act two separate and distinct subjects; namely, (1) fixing and allowing ex officio fees of the sheriff, and (2) authorizing the appointment, compensation, etc of a deputy sheriff of the County.

In cases where the title of the act embraces two distinct subjects but the body of the act deals with only one of them, the statute has been held to have been constitutionally enacted. However, when both the title and the body of the Act embrace two subject, the courts have not undertaken to choose between them, and have held the entire Act invalid. **Builders Supply Co. vs. Lucas Company,** 119 Ala. 202, 24 So. 416; **Balletyne vs. Wickersham,** 75 Ala. 533.

It is further my opinion that Section 1 of the Act is violative of other constitutional provisions.

Section 1 purports to allow $100.00 per month to the Sheriff of Elmore County as ex officio fees, or as compensation for policing the dance halls and fishing camps and for patroling the lakes in said county and as ex officio fees for performing other public services required of him for which no compensation is provided.

If the increased compensation provided by the Act is based upon the alleged "additional duties" imposed upon the officer, the Act is not within the rule laid down in **Taylor vs. Davis,** 212 Ala. 282, 102 So. 433, and is, therefore violative of Section 281 of the Constitution. The policing of dance halls and fishing camps and the patroling of lakes in the county come within the general duties of the sheriff. **Chapter 344 of the Code of 1923.**

If the increased compensation is to be considered as ex officio fees for patroling the lakes, etc, Section 1 of the Act runs afoul of Section 96 and sub-section 24 of Section 104 of the Constitution, and is, therefore, void (Vaughan vs. State 212 Ala. 461, 103 So. 38) unless the provision therein contained "shall be paid for patroling the lakes and for policing the dance hall and fishing camps in said county" may be stricken as surplusage, and the Act sustained under the last clause of Section 68 of the Constitution. But ex officio fees should be fixed by general law and not by local act. Sub-section 24 of Section 104 of the Constitution of 1901, **Vaughan vs. State,** supra.

In any event, in my opinion, the entire Act is invalid.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 11, 1936.

Hon. Eugene B. Henry,
Commissioner of Licenses,
Jefferson County,
Birmingham, Alabama.

Driver's License: City Officers.

Motorcycle scouts employed by municipality required to secure driver's license.

Opinion by Assistant Attorney General Moore.

Dear Sir:

In reply to your letter of December 13, in which you state:

"Please advise me if police motocycle scouts operating a motorcycle owned by the City of Birmingham, are required to purchase drivers licenses."

I advise that in my opinion such officers are required to secure driver's license. Section 5 of the driver's license provides the only exemptions given and none are afforded to officers of the State, Counties or Municipalities.

The license levied is in my judgement on the driver and hence the fact that the driver is employed by a sub-division of the State, does not serve to relieve such driver of qualifying under the drivers license law.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 11, 1936.

Hon. W. L. Pratt,
Judge of Probate, Bibb County,
Centreville, Alabama.

Mine operator who maintains an established yard or place of business is liable for license as provided in Schedule 36.1 of the Revenue Code of 1035.

Opinion by Assistant Attorney General Small.

Dear Sir:

You request my opinion as follows:

"Does a man operating a coal mine who sells his output of coal at the mines to any person who may come to purchase same have to have any license under the Revenue Code of Alabama. He pays his tonnage taxes the law requires."

In reply, I wish to advise that if the mine operator referred to in your letter maintains an established yard or place of business from which his coal is weighed with adequate wagon or truck scale that a license is provided in Schedule 36.1 of the Revenue Code of 1935, page 248. If these facts do not exist I know of no license tax provided in the 1935 Revenue Code, supra.

Section 36.1 of the 1935 Revenue Code provides as follows:

"Schedule 36.1. Each person dealing in coal or coke and maintaining one or more established yards, with adequate wagon or truck scales, from which yard or any yard of an established dealer, all retail deliveries are loaded, in cities or towns of five thousand (5,000) inhabitants or less, whether incorporated or not, five dollars ($5.00); in cities of more than five thousand (5,000) and not more than twenty thousand (20,000) inhabitants, ten dollars ($10.00); In cities of more than twenty thousand (20,000) inhabitants, twenty dollars ($20.00) for each yard. This Schedule shall not apply to persons whose inventory and sales are in quantities of less than one-half ton. Each such person shall, within thirty days after the approval of this Act and annually thereafter at the time of paying for and procuring his dealers license, register with the officer in the county collecting and issuing licenses the number of trucks to be operated from his one or more yards and shall at the time of such registration pay a fee of one dollar ($1.00) per truck for each truck so used, and shall procure a tag for each truck, showing the year for which it issued, the registration number, and the term "Coal-Coke Dealer or Hauler", and the abbreviation of Alabama, and such tag shall at all times be conspicuously displayed next to the regular license tag on all trucks engaged in this business. The dimensions of this tag shall be not less than four inches by eight inches, and it shall be of a color different from the then current license tag. The registration fee herein provided shall be in addition to the regular motor vehicle license fee."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 13, 1936.

Hon. Chas W. Lee,
State Comptroller,
Capitol.

Statutes—House Bill No. 191, approved September 9, 1935 provides method of payment of county warrants different from Section 749 Code of 1923.

1. House Bill 191 approved September 9, 1935 held to partially repeal Section 749 of the Code of 1923.

Opinion by Assistant Attorney General Small.

Dear Sir:

You request my opinion as follows:

"Does House Bill No. 191 approved September 9, 1935 repeal Section 749 of the Code of 1923."

In reply, I wish to advise that in my opinion House Bill 191 does not repeal Section 749, Code of 1923 in toto.

Section 749 of the Code of 1923 provides as follows:

"749. Expense account against county; how audited and paid.—Immediately after the completion of an examination of the several county officers, which shall be made at the same time that examinations are

made for the state, the examiners making such examination shall make out an account, under oath, for and in the name of the state, against said county, for approximately the number of days engaged in the county examination for such county at the same rate of pay and expense allowed for state work and file the same with the clerk of the board of revenue, court of county commissioners or courts of like jurisdiction of said county, and also file a duplicate thereof with the state auditor, and the state auditor shall thereupon draw his warrant upon the county treasurer for said amount, and the county treasurer, immediately upon receipt of the auditor's warrant, shall pay the said amount into the state treasury out of the first county funds coming into his possession."

"House Bill 191, Section 5 approved September 9, 1935 provides as follows:

"Section 5. Who Shall Issue Warrants. No warrant shall be issued on check drawn on the County Treasury or County Depository by any person except the Judge of Probate or Chairman of the Board of Revenue, or like governing body, or such other officer as may be designated by such Board; and officers who are authorized to pay claims which have not been first approved by the Board, shall issue orders for warrants or checks which must be presented to the officer so authorized to issue warrants payable out of the County Treasury or County Depository."

You will observe that there is a conflict between the above considered laws in that House Bill 191 provides a different mode of issuing warrants on the county from that provided in Section 749, Code of 1923. House Bill 191, Section 19, supra, provides as follows:

"Section 19. Repeals Conflicting Laws. All laws and parts of laws, except local acts applying to single counties, conflicting with any of the provisions of this Act be and they hereby are repealed."

Both of the above laws are general in application. House Bill 191, supra, being enacted at a later date than Section 749, supra, would, of course, be controlling insofar as it is in conflict with other laws and would operate to repeal the same as provided in Section 19 quoted above.

I refer you to Maxwell v. State, 89 Ala. 156, also to 59 C. J., page 902.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 13, 1936

Hon. Tisdale J. Touart,
Judge, Inferior Criminal Court,
Mobile County,
Mobile, Alabama.

The Solicitor's fee for conviction of violation of Driver's License Act is $10.00, coming under the provisions of Section 3738, Code of Alabama, 1923 which says: "For each conviction of a misdemeanor, not otherwise provided for $10.00.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 7, 1935 in which you request my opinion as follows:

"Referring to Act of Legislature providing for the public safety, issuance of driver's license etc., designated as House Bill No. 545, please advise us:

"In the event of conviction for a violation of the provisions of this act, should a solicitor's fee of $10.00 be charged, or should we charge a fee of $30.00?"

I am clearly of the opinion that the driver's license required under House Bill 345 by Wallace is not a Revenue Bill, but is a regulatory measure coming under the police powers of the State. Therefore, on a conviction or failure to comply with the provisions of the act, the solicitor's fee would be $10.00. Under Section 3738, Code of Alabama, 1923, which section set out fees and commissions of solicitors, we find provided among other things: "For each conviction of misdemeanor not otherwise provided for, $10.00," and I do not find where the act supra provides for a solicitors fee. Therefore, it comes under the provisions of the above quoted section. I call your attention to the case of State vs. Kartus, 162 So. 533. Of course, this case is not construing the act we have under consideration, but it is dealing with a like matter and throws considerable light on the question here involved.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 13, 1936.

Hon. Geo. L. Sherrill,
Register in Chancery,
Limestone County,
Athens, Alabama.

Register is not entitled to commissions on sale not made by him, but is entitled to commissions on money received and distributed by him.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of December 27, 1935, in which you request my opinion as follows:

"A bill has been filed in my court to ratify and approve a contract of sale made between the parties including a guardian for minors.

"Under the decree of the court approving the contract of sale $20,000.00 Dollars is paid into court. And in addition the purchasers assume the balance of a mortgage debt of $3430.00.

"The question is, is the Register entitled to fees in a case of this kind just like it would be if the Register has made the sale?

"If not, please give an opinion stating what fees the Register will be entitled to under this statement of facts.

"I must have this information in the office by January 1st, 1936, and shall thank you to give this matter your early attention."

I assume that the money "paid into court" is to be received and disbursed by the Register. In such case, under the facts stated, you as Register would not be entitled to commissions as if you had made the sale.

This question was passed on by the Supreme Court of Alabama in the case of Rome & D. R. Co. v. Sibert (97 Ala. 393, 12 So. 69), where a receiver sold a railroad and submitted the sale to a Court of Chancery for approval. and made the following statements:

The register claimed a fee for making the sale. The Court denied the claim

> "Our statute (section 3683 of the Code) declares the scale of commissions the register is entitled to for making sales. Section 3665 provides that 'the law of fees and costs must be held to be penal, and no fee must be demanded or received except in cases expressly authorized by law.' In Tillman v. Wood, 58 Ala. 578, it was said: 'The rule of statutory construction is well settled that statutes giving costs are not to be extended beyond their letter, but strictly construed, for the reason that costs are in the nature of a penalty.' See, also, Dent v. State, 42 Ala. 514; City Council v. Foster, 54 Ala. 62; State v. Brewer, 59 Ala. 130; 1 Brick. Dig. p. 417, Sec. 6. Dorsey made and reported the sale in this case, and he was unquestionably entitled to commissions for making it. **The register did not make the sale, and he is not entitled to commissions.** To hold otherwise would be to depart from the statute, (Code 3683) and all the rulings pronounced upon it." (Underscoring supplied).

"Section 3683" above referred to, (Code of 1886) is the same as Section 7283 of the Code of 1923, which is the present law in reference to fees allowed to registers. You would not, therefore, be entitled to commissions on the sale.

You would, however, be entitled to the commissions provided for, "For receiving, keeping, and paying out or distributing money, other than that arising from sales . . . . . " (Code Sec. 7283). While this provision specifically except funds received "from sales", it must be interpreted in conjunction with the rest of the paragraph and means, on all funds received and distributed except from sales made by the Register.

Therefore, you would be entitled, "on the first one thousand dollars, one per cent; on all over one thousand dollars and not over five thousand dollars, three-fourths of one per cent; on all over five thousand dollars, not exceeding ten thousand dollars one-half of one per cent; and all over ten thousand dollars, one-fourth of one per cent; . . . . " (Section 7283, Code of 1923).

This comission would be paid on the $20,000.00 received and distributed by the register, but would not be received on the $3430.00 mortgage debt assumed.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 13, 1936.

Hon. H. E. Kendrick,
Tax Collector, Dallas County,
Selma, Alabama.

Taxation. Payment of taxes on separately assessed parcel does not relieve such property from being subject to levy for any other taxes due by the taxpayer.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter in which you state:

"Please give me as soon as possible your opinion on the following:

" A taxpayer has several pieces of Real Estate, also personal property made on the same assessment and each piece of real estate described and valued separately. He wishes to pay the State and County tax on all except one (1) piece of the Real Estate and says that he wishes not to pay the tax on the one piece, but wants it to go to tax sale due to the fact that there are certain Municipal improvement costs that he does not want to pay.

"Under the above circumstances, is there any legal authority for me to accept payment and release the property paid on of any further liability insofar as state and county tax are concerned."

In reply, I advise that as you know taxes are a personal obligation on the part of the person charged therewith as well as a lien on his property, and that all the property of the taxpayer is subject to levy for taxes due by him.

Revenue Act 1935, Sec. 372.

Revenue Act 1935, Sec. 172.

It is likewise the Collector's duty to collect all the taxes.

Revenue Act 1935, Sec. 164.

It is the Collector's duty to levy on personal property.

Revenue Act 1935, Sec. 170.

In order to make collection he may run garnishments.

Revenue Act 1935, Sec. 173.

He is presumed to have exhausted personal methods of collection, before asking for a sale of real estate.

Revenue Act 1935, Sec. 177.

I have cited the foregoing Sections of the New Revenue Act but they are found substantially if not identically in the same words in the prior Acts.

My conclusion therefore is that while, a person may make partial payments of taxes (Sec. 12) and under certain conditions, may pay on separately assessed parcels (Sec. 169 A) yet such action does not relieve the taxpayer of the duty of paying the balance due by him nor does it relieve the collector of enforcing the collection of such balance by all the methods provided which may be necessary.

If a further remark be needed, I think it quite clear from Sec. 172, that the payment of taxes due on one parcel does not relieve such parcel from being subject to levy for any other taxes due by the taxpayer, and that you

are not authorized in the absence of payment of all the taxes due to release any of the property of the taxpayer from further liability.

Also see Biennial Report 1928-1930 p. 253.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 13, 1936

Hon. M. F. Elrod,
Chairman, Marshall County Board of Revenue,
Guntersville, Alabama.

Officers-Chairman and Members of Board of Revenue of Marshall County (Act No. 492, approved September 13, 1935) entitled to compensation from beginning of terms of office, notwithstanding the fact that commissions as such officers were not issued to them until a later date.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion, as follows:

"Please give me a ruling on when my pay started as Chairman of the County Board of Revenue. I was appointed Sept. 13th, and my commission is dated October 9th, also advise about the clerk. I employed him on September 20th, and the Board of Revenue set his salary on the first meeting day thereafter, which was October 9th. Also the members of the board, as to when their pay starts, and if there is any time elapsed as to their pay, between the time they were appointed and the date of their commission."

Your questions as to the compensation of the Chairman and the Members of the Board of Revenue are answered by a reference to Section 2582 of the Code of 1923. It provides:

"Commission not necessary.—All county officers, and officers chosen for any portion or district of a county, shall be authorized to exercise the duties and functions of the office to which they are elected, after they shall have received certificates of their election, as provided by law, whether they have received their commissions or not; but such officers shall first give the bond, if any, required by law, and take the oath of office prescribed by the constitution."

So that in my opinion, their compensation dates from the effective date of the Local Act,(Act No. 492, approved September 13, 1935), in the case of Members of the Board and from the date of his appointment in the case of the Chairman. The fact that commissions were not issued to these officers at the time of the effective date of the Act or at the time of the appointment of the officers does not affect the right of the officers to their compensation. The Clerk's compensation should begin on the date of his entrance upon his duties as said clerk. If he began his duties immediately upon his appointment by the Chairman, his compensation would begin on that date.

It must not be inferred from anything said herein, that an opinion is expressed as to the constitutional validity of the Local Act under consideration (Act No. 492, approved September 13, 1935).

Yours very truly,
A. A. CARMICHAEL
Attorney General

January 13, 1936

Hon. C. D. Rutherford, Chairman,
Board of Registrars,
Russell County,
Hatchechubbee, Alabama.

Time—"One week," as used in Section 392 of the 1923 Code of Alabama is composed of six working days and Sunday.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of January 6, 1935 in which you state:

"The Russell County Board of Registrars is now engaged in purging the Registration List as required by law.

"The law on this subject states that the Board shall be in session **One Week.**

"Should this be interpreted as meaning **Seven Working Days,** or the period Jan. 6 through January 11th, which is **Six Working Days?"**

In answering your question, I am assuming that you have reference to Section 392 of the 1923 Code of Alabama, which is as follows:

"392. Times for purging list of registration.—The board of registrars shall meet in each county on the first Monday in January 1928, and every two years thereafter, for purging the registration list, and may continue in session one week. The names of those who have died, become non-residents of the State, become insane, and so declared by inquisition of lunacy, or who have been convicted of any offense mentioned in Section 182 of the constitution, since being registered, or otherwise disqualified as electors under the provision of the constitution, and any names which may have been fraudulently entered on such list shall be stricken from the registration list."

It is my opinion that the phrase **"one week"**, as used in the statute, supra, means one week of seven consecutive days, being on the first Monday in January and ending at twelve o'clock midnight on the next Sunday thereafter. Said week to include six working days and Sunday.—See **62 Corpus Juris,** page 973, and cases cited thereunder.

Yours very truly,
A. A. CARMICHAEL
Attorney General

January 14, 1936.

Mrs. Jessie W. Nunnelee,
Chairman, Board of Registrars,
Montgomery County,
Montgomery, Alabama.

(1) Electors—Registration—Applicant for registration must be twenty-one years of age or more at time of registration.

(2) Electors—A person whose civil and political rights have been forfeited by reason of conviction of crime may register at the session of the Board next succeeding the restoration of said rights.

(3) Electors—Aliens—The naturalization or alien ipso facto confers like rights upon his wife and minor children who are then residents of Alabama.

(4) Electors—Registration—Illiteracy is not necessarily a disqualification from registration.

(5) Electors—Person residing without the State may nevertheless be qualified elector.

(6) Board of Registrars—Act No. 532, approved September 14, 1935 providing dates for special sessions of the Board for registration of electors supersedes Section 376 of the Code of 1923, Section 376 of Acts 1927, page 274, Acts 1932, page 67 and Acts 1933, page 50, which provided for such special sessions for said purpose.

Opinion by Assistant Attorney General Rowe.

Dear Madam:

I have your request for opinion as follows:

"(1) Is the applicant allowed to register provided he or she is 21 years of age by the next general election or is the applicant required to be 21 years of age or over at the time of application?

"2. How long after civil rights are restored to a citizens before he or she is allowed to register?

"3. When a foreigner becomes naturalized, do his wife and children automatically become naturalized?

"4. Shall the applicant, who cannot sign his or her name, be allowed to register?

"5. When and under what circumstance is a person a 'non-resident' within the meaning of the Registration Statutes.

"6. I will also appreciate the dates of the meetings of the Board of Registrars, calling your attention to the sections in Volume 1 of the Code of 1923, the amended Act in 1927, the amended Act in 1932, the amended Act in 1933, and especially Acts 460 and 532 of the 1935 session. It appears that Act 532 amends Section 376 of the Code of 1923, as amended by an Act of the Legislature of 1927, whereas this same section was also amended in 1932 as shown on page 67, but this fact is not included in Act 532. The Act of 1932 provides for certain dates of registration

which are not included in Act 532 of the 1935 Legislature. Is the 1932 Act void or still in force-"

Your first inquiry has been answered heretofore in the negative in an opinion addressed to you dated December 12, 1935.

Answering your second inquiry, a person whose civil and political rights have been forfeited by reason of his conviction of crime may apply for registration at the session of the Board of Registrars next succeeding the restoration of said civil and political rights.

Your third inquiry is answered in the affirmative. The naturalization of an alien ipso facto confers rights of citizenship on his wife and minor children who are residents of this State. See 2 C. J. page 1128.

Your fourth inquiry must be answered in the negative. The constitution of 1901, Section 181, provides:

> Sec. 181. After the first day of January, nineteen hundred and three, the following persons and no others, who, if their place of residence shall remain unchanged, will have, at the date of the next general election, the qualification as to residence prescribed in section 178 of this article, shall be qualified to register as electors; provided, they shall not be disqualified under section 182 of this constitution.
>
> "First.—Those who can read and write any article of the Constitution of the United States in the English language, and who are physically unable to work; and those who can read and write any article of the Constitution of the United States in the English language, and who have worked or been regularly engaged in some lawful employment, business, or occupation, trade or calling, for the greater part of the twelve months next preceding the time they offer to register; and those who are unable to read and write, if such inability is due solely to physical disability; or,
>
> "Second.—The owner in good faith in his own right or the husband of a woman who is the owner in good faith, in her own right, of forty acres of land situate in this state, upon which they reside; or the owner in good faith in his own right, or the husband of any woman who is the owner in good faith, in her own right, of real estate situate in this state, assessed for taxation at the value of three hundred dollars or more, or the owner in good faith, in his own right, or the husband of a woman who is the owner in good faith, in her own right, of personal property in this state assessed for taxation at three hundred dollars or more; provided, that the taxes due upon such real or personal property for the year next preceding the year in which he offers to register shall have been paid, unless the assessment shall have been legally contested and is undetermined."

It will be observed that the foregoing constitutional provision does not, in all cases, make illiteracy a disqualification from registration.

Your fifth inquiry involves a mixed question of law and fact.

"Legal residence", within the contemplation of the constitutional and statutory provisions relating to registration, is a question which must be solved from all the surrounding facts and circumstance. Cf. Lucky vs. Roberts, 211 Ala. 578 and cases there cited.

In Shepherd vs. Sartain, 64 So. 57, 185 Ala. 439, the Court said:

"(12) 8. So, also, when a registered voter abandons his residence in this state and acquires a legal residence in a foreign state, he cannot vote again in this state until he has again qualified by a new period of residence and a new registration herein, as prescribed by law for an original registration."

"(37) 27. When a voter moves away from an existing domicile and acquires a home and resides in another place, it will be presumed, nothing appearing to the contrary, that he has changed his legal residence." See also Words and Phrases, Fourth Series, "Legal Residence."

Legal residence may be said to be that place in which a person's habitation is fixed without any present intention of removing. It embraces (1) the fact of residence and (2) the intention to remain. **Curry vs. Barnes,** 76 So. 22, 200 Ala. 256; **Young vs. Pollak,** 5 So. 279, 85 Ala. 439.

In answer to your sixth inquiry, it is my opinion that Act No. 532, approved September 14, 1935 is, in fact, amendatory of and a substitute for all prior enactments upon that subject, namely: Section 376 of the Code of Alabama, 1923 as amended by Acts of 1927 (Sec. 376) page 275, and by Acts 1932, page 67 and by Acts of 1933, page 50.

When a subsequent act covers the entire field upon which prior acts operated, and patently was intended as a substitute therefore, the prior acts are repealed thereby, although no specific intention to repeal the same may be indicated in the said subsequent act. Bradford v. Carson, 223 Ala. 594, 137 So. 426.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 15, 1936.

Hon. Chas W. Lee,
State Comptroller,
Captitol.

Costs and Fees—

State not liable for $1.00 library tax in Jefferson County.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of December 2, 1935, in which you request my opinion as follows:

"A number of cost bills in Civil cases brought by the State of Alabama in Jefferson County wherein the State failed to receive a judgment and the cost was taxed against it, have been submitted to this Department for collection.

"These bills include the $1.00 Library Tax until recently authorized in Jefferson County by a local Statute.

"I would like to know whether the State should pay this Library Tax.

"This cost accrued prior to the repeal of this law."

In my opinion your inquiry must be answered in the negative.

The Legislature of Alabama (General Acts 1927, page 261) by an Act approved August 11, 1927, provided for a fund for the support of a Law Library in certain counties as follows:

"Section (1). That in all civil (including equity) cases hereafter filed in or brought by appeal or certiorari to the Circuit Court, of Counties of two hundred thousand or more inhabitants there shall be taxed as costs, the sum of one dollar in each case to be collected as other costs are collected, and to be paid to the Clerk of such Circuit Court. The said sum of one dollar shall be called the "Library Tax" and shall be expended by the Circuit Court of such county by orders of the Presiding Judge thereof, for maintaining a Law Library for such Circuit Court. Provided, that this act shall not apply to cases filed by municipalities for the purpose of selling property for collection of taxes due such municipalities."

Admittedly, this statute was enacted for the purpose of raising revenue. The item of costs is expressly designated a "Library Tax" by the Act itself, supra. The levy of this tax is similar to the Trial Tax prescribed by law for such Courts. It has been held by this office that the State is not liable for the Trial Tax in suits instituted by it. See opinion to Hon. Chas. W. Lee, State Comptroller, Capitol, May 23, 1935 (Book 4-A Off. Ex. Atty. Gen. Opinion p. 50).

To hold that the State would be liable to pay the library tax would be in effect that a State should tax itself.

Griel Bros. Co. v. Montgomery, 182 Ala. 291, 62 So. 692.
Huntsville v. Madison Co., 166 Ala. 389, 52 So. 326.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 15, 1936.

Hon. Gaston Scott,
President, Highway Commission,
CAPITOL.

Fines—Disposition of fines from cases made by the old Highway Patrol.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of December 12, 1935, in which you state:

"This is to advise the Traffic Officers employed under authority of the State Highway Department Act were transferred to the Motor Patrol under date of December 4, 1935, together with equipment paid for by the State Highway Department.

"Prior to the transfer, these officers made a number of cases, a number of which have been postponed and have not been finally disposed of.

Others have been settled and we are receiving remittances from the Courts covering fines assessed.

You request my opinion:

"If the fines from cases made by the old Patrol who operated under the State Highway Department prior to the time they were transferred to the New Highway Patrol should be paid to the State Highway Department or to the Motor Patrol."

It is my opinion that all fines from cases made by the old Patrol should be paid to the State Treasurer who will credit the amounts received to the State Highway Department for the maintenance of Roads and Bridges.

I call your attention to Section 106 of Act No. 347, H. B. 391, approved August 23, 1927 (General Acts 1927, p. 390) which is as follows:

"Section 106. FINES AND FORFEITURES. All fines and forfeitures collected upon conviction or upon forfeiture of bail of any person charged with a violation of any of the provisions of this Article constituting a misdemeanor, shall be within thirty days after such fine, or forfeiture is collected forwarded to the State Treasurer. All amounts received from such fines or forfeitures shall be credited to the funds of the State Highway Department, for the maintenance of Roads and Bridges. Failure, refusal or neglect to comply with the provisions of this section shall constitute misconduct in office and shall be ground for removal therefrom. Provided that all fines and forfeitures collected by Recorders Court or other municipal Courts for violation of ordinances, in cities and towns of over two thousand population according to the last or any subsequent census, whether for acts constituting violations of the provisions of this article or not, shall be paid into the Treasury of such municipality in which the same was collected."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

January 15, 1936.

Hon. Saxon P. Poyner,
Judge of Probate,
Houston County,
Dothan, Alabama.

License and Taxation—Record Filing Tax—

(1) Where deeds are executed by co-tenants to effect partition of lands, each conveyance is liable to record filing tax (Schedule 46, Section 348 of Revenue Act of 1935.)

(2) The value of the interest conveyed in deeds of co-tenants to effect partition of lands is the measure of the record filing tax to be collected upon such conveyance.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion dated January 2, 1936, as follows:

"Kindly refer to Biennial Report of the Attorney General, 1926-28 at page 42, where an opinion was rendered by your office with reference to Deed Tax between Tenants in Common.

"Also refer to Acts of 1927, Page 163, Section 21½, which states in part as follows: 'provided, further, that where several deeds or instruments are executed by tenants for the same consideration, only one of such instruments shall be taxable under this Section.'

"'A' and 'B' are Tenants in Common of 80 acres of land. 'A' deeds to 'B' his undivided one-half interest in one of the 40's. 'B' deeds to 'A' his undivided interest in the other 40. The value of the land being $40.00 an acre, how much Deed Tax shall we collect? Shall we collect Tax on both Deeds? Does Section 21½ over-rule in any respect the opinion first above referred to."

The opinion in Biennial Report of the Attorney General 1926-1928, at page 42, which holds that "where one tenant in common or joint tenant conveyed his interest in the jointly owned property to his co-tenant, the value of the interest conveyed is the measure of the filing tax", represents the studied judgment of this office upon the question.

Section 21½ of Acts of 1927 (which has been carried over into and superseded by Schedule 46 of Section 348 of the Revenue Act of 1935) providing that "where several deeds or instruments are executed by tenants in common for the same consideration, only one of such instruments shall be taxable, etc.", does not apply to the situation dealt with in the opinion, supra, nor does it apply to a conveyance between co-tenannts such as that detailed in your request.

Specifically, your inquiry is as to the amount of the deed filing tax collectible on the two conveyances between "A" and "B", who are joint owners or tenants in common of 80 acres of land of the value of $40.00 per acre, whereby each conveys to the other his undivided one-half interest in one of the two 40s, so that each becomes the owner of the fee of one of the parcels. In my opinion, the principle of the former opinion of this office, cited supra, governs, and the deed filing tax should be collected on each deed, according to the value of the property or interest therein conveyed. Under your statement, each 40 is valued at $1600.00; each deed conveys an undivided one-half interest in a parcel of land of that value, that is to say, each conveys a property value of $800.00. A filing tax, based on such valuation of $800.00, should be collected on each deed when the same is offered for record.

The conclusion of the opinion of this office dated December 28, 1934, addressed to Hon. Irby Pope, Probate Judge of Perry County, (Opinions of Attorney General, Office Edition, Book 1-A, page 131) construing the provision of Section 21½ of the General Revenue Act of 1927 (Acts 1927, page 163) provided that "where several deeds or instruments are executed by tenants in common for the same consideration, only one of such instruments shall be taxable", was departed from in a subsequent opinion dated October 8, 1935, addressed to Hon. W. C. Batson, Probate Judge of Chambers County (Opin-

ion of Attorney General, Office Edition, Book 7-A, page 52). The opinion, supra, addressed to Judge Pope, and all other opinions heretofore rendered by this office, which may conflict with the conclusion of that addressed to Judge Batson, supra, and of this opinion, are overruled and withdrawn.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 15, 1936.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.
Taxation: Board of Review.

(1) The assessment of the Board of Review after the close of the tax year, becomes final and cannot be set aside or changed in the absence of fraud.

(2) Such assessment as shown by the record cannot be changed by parol evidence.

Opinion by Assistant Attorney General Moore:

Dear Sir:

Your letter of December 30 states:

"According to the Tax Assessor of Pickens County, Alabama, the following proceduce took place in that Country during the year 1933 in the matter of reductions of assessments, to-wit:

"The County Commissioners, who comprise the Board of Review, met in the office of the Tax Assessor as required by law, on the first Monday in June of the year of 1933 to consider applications made for reductions in assessments. The Tax Assessor as Tax Assessor of Pickens County, had prepared a typewritten list showing on the list the previous year's valuation, the current year's valuation as fixed by the Taxpayer and the amount of each reduction. This list was placed before the Board for their consideration.

"The Board was in session about an hour, and they did not examine each assessment as required by law. No taxpayer appeared at the meeting to press his claim for any reduction.

"Several questions were asked the Tax Assessor by members of the Board of a general nature, and comments were made by the board of the poor crops made in Pickens County the previous year and the not so bright outlook for another year. A motion was made by one member of the Board that the reductions be granted as asked for, and the valuations be permitted to stand as fixed by the taxpayers. This motion was duly seconded and carried. The Tax Assessor acting under this authority proceeded to make up his tax abstract using the valuations as fixed by the taxpayers. No minutes were recorded of the meeting, and no notations of the Chairman, who was one of the members of the Board of Review, were made on the assessment sheets.

"The above is the substance of the action taken by the Board at said meeting and is the authority used by the Tax Assessor in setting up the valuations for the 1933 taxes.

"1. Has the Board of Review authority to grant reductions by blanket order?

"2. Are these reductions chargeable to the Assessor?

"A prompt reply to this request will be appreciated."

(1) In reply to question 1, I call to your attention opinion appearing in Biennial Report 1930-1932, p. 270, holding that the Board of Review has no such authority.

(2) In reply to your second question, I cannot under the facts set out by you, make a categorical reply. I do not see how you can go behind the judicial action of the Board of Review as shown by the record.

If the Board of Review, as indicated by your statement, did not follow the statutes in making these assessments, or exceeded their powers, the agent of the State Tax Commission should have apprised the Commission and such assessment should have been set aside and the properties assessed by the Commission.

The record, especially after the fiscal year has closed is presumptively concluive, and generally speaking in the absence of fraud, cannot be impeached by parol evidence.

While the action of the Board under the facts set out by you was not strictly in accordance with law, the State having taken no action to set aside the assessment within the tax year. I do not think you can reopen the same at this time.

State vs. Doster Northington Drug Co., 196 Ala. 447.

The Tax Assessor is secretary of the Board of Review and his entries in the Board of Review column were of the action of the Board. I am therefore of the opinion that you cannot charge these reductions to the assessor.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 15, 1936.

Hon. I. T. Quinn, Commissioner,
Department of Conservation,
The Capitol.

The Department of Conservation must operate out of the revenue received by it.

The Commissioner of the Department of Conservation can, if he sees fit contract with hotels for advertisement in "Alabama Game and Fish News," its magazine and receive pay for same by accommodations given to those traveling on official business for this department.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of October 15, 1935, in which you request my opinion as follows:

> "It is my purpose, and it has the approval of the Board of Administration and the Governor, to carry advertising in this Department's monthly publication, 'Alabama Game and Fish News'."
>
> "In soliciting advertising it is found that certain hotels would like to exchange the courtesies of the hotel (rooms without charges) for advertising. While such system, in so far as these institutions are concerned, would not reduce the cost of publication, it would prove considerable saving in revenues each year to this Department which have in the past and are now being spent for lodging by those of my staff who are frequently out over the State.
>
> "No State revenues are involved, and apparently only a question of policy would in any way be involved, unless there be some legal barrier involved in such transaction.
>
> "I would thank you to give your opinion as to whether or not there are any legal restrictions involved in the question."

It is my opinion a contract of this character may be entered into under Section 44 of an Act approved August 12, 1935, (General Acts, 1935, now in manuscript), which is as follows:

> "Section 44. All money arising from the sale of hunting and fishing licenses, penalties, forfeitures etc., and from permits or other sources, relating to or growing out of the administration and enforcement of the game and fish laws of this State, shall be forwarded on the first day of each month to the Commissioner, by the officer, court or other person authorized to collect same and shall by the Commissioner be remitted to the State Treasurer, who shall deposit same in a separate fund to be known as the 'Game and Fish Fund'. Said Game and Fish Fund shall be used for the payment of the salary of the Commissioner, and for all necessary incidental expenses, and further for the payment of the salaries and expenses of the game and fish wardens and agents, and the salaries of all employees of the Department, and further for the purchase, transportation, propagation and planting of brood stock of game, birds and animals, and further for the acquisition of lands as provided in this Act, and the purchase, propagation and distribution of fresh water fish. The expenses incurred for any purpose under the provisions of this Act shall be limited to the amount of money in the Game and Fish Fund, and in no event shall said fund, or any part thereof, be spent for any purpose other than as provided in this Act, and at no time shall said revenues or any part thereof be spent for any purpose by any official, employee, agent or institution of the State of Alabama, but shall remain in the Game and Fish Fund to be spent for the purposes for which same were collected."

Of course, the accommodation must be accorded to persons working out of the Department of Conservation while traveling on official business. Under Section 44, supra, the expenses of this Department must be paid out of

the funds of the Department and can be paid from no other, therefore the method you suggested as payment in part of this expense can in my opinion be adapted and you may if you see fit enter into such a contract.

Yours very truly,
A. A. CARMICHAEL,
Attorney General

January 16, 1936.

Hon. Mack Killcrease,
County Solicitor and City Attorney,
Albertville, Alabama.

Licenses—All municipalities in the State of Alabama, with the exception of municipalities having or which may have a population of as much as sixteen thousand and less than eighteen thousand people, may levy and collect a license or privilege tax on public utilities doing business within the police jurisdiction but without the corporate limits of said cities, and said municipalities may go back for a period of five years in collecting delinquent licenses.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of January 4, 1936, in which you state:

"The City of Albertville has legally assessed a license tax against public utilities in accordance with an Act approved September 6, 1927 appearing at page 764 of the Acts of 1927, within the corporate limits and within the police jurisdiction of the City. But the utilities making returns only made their returns based upon receipts within the City limits and have not paid any license upon receipts outside the City limits, but within the jurisdiction of police."

You request my opinion:

"1. Is a public utility liable for a license outside the City but within the police jurisdiction?

"2. If the utility is liable for this license, can the City go back five years as in the case of ad valorem taxes?

It is my opinion that all municipalities in the State of Alabama, with the exception of municipalities having or which may have a population of as much as sixteen thousand and less than eighteen thousand people, may levy and collect a license or privilege tax on public utilities doing business within the police jurisdiction, but without the corporate limits of said cites.

I call your attenton to Act No. 49, H. B. 30, approved February 9, 1935, (General Acts, 1935) which is as follows:

"Section 1. That all cities or towns within the State of Alabama which now have or which may hereafter have a population of as much as sixteen thousand and less than eighteen thousand people according to the last Federal census or any such census which may hereafter be taken, are hereby prohibited from collecting licenses for any business, trade or profession done or carried on within the police jurisdiction of such city

or town and without the corporate limits thereof; provided, further, that this act shall not have the effect to repeal or modify the limitations provided by Sections 2157, 2158, 2159, 2160, 2161 and 2162 of the Code of Alabama of 1923, relating to railroads, express companies, sleeping car companies, telegraph companies, telephone companies and public utilities."

Act No. 235, H. B. 358, approved November 9, 1932, (General Acts, Extra Session, 1932, at page 240) which is as follows:

"Section 1. That Section 1 of an Act entitled 'An Act to authorize all cities and towns within the State of Alabama to fix and collect licenses for any business, trade or profession done outside the corporate limits but within the police jurisdiction thereof, 'Approved September 6, 1927, be and the same is hereby amended so as to read as follows: 'Section 1. That any city or town within the State of Alabama may fix and collect licenses for any business, trade or profession done within the police jurisdiction of such city or town and without the corporate limits thereof; provided, however, that the amount of such licenses shall not be more than one-half the amount charged and collected as a license for like businesses, trade or profession done within the corporate limits of such city, fees and penalties excluded. 'Provided further that when the place at which any such business, trade or profession is carried on lies within the police jurisdiction of two or more municipalities which levy the license thereon authorized by this section, such license shall be paid to and collected by that municipality only whose boundary measured to the nearest point thereof is closer to the location of such business trade or profession. 'Provided that this act shall not have the effect to repeal or modify the limitations provided by Sections 2157, 2159, 2160, 2161, 2162 of the Code of Alabama of 1923, relating to railroads, express companies, sleeping car companies, telegraph companies, telephone companies and public utilities."

See Biennial Report of the Attorney General for 1930-1932, Page 11, and the following cases: **City of Dothan v. Alabama Power Company,** 229 Ala. 146, 155 So. 697; **White v. City of Decatur,** 225 Ala. 646, 144 So. 873; **Fuqua v. City of Mobile,** 219 Ala. 3, 121 So. 697.

In answering your second question, it is my opinion that a municipality may go back for a period of five years and collect the delinquent licenses due by the public utility. Such action is governed by Section 8945 of the 1923 Code of Alabama, which is as follows:

"8945. Limitation of five years.—Within five years—

"1. All actions founded on equities of redemption, where lands have been sold under a decree of the circuit court in chancery proceedings, existing in any person not a party to the proceedings, who claims under trust.

"2. All actions by the State or any subdivision thereof for the recovery of amounts claimed for licenses, franchise taxes, or other taxes."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 16, 1936.

Board of Revenue and Road Commissioners,
Mobile County,
Mobile, Alabama.

Oysters—Tax imposed by Section 2, Acts of 1933, page 111 held to be a tax upon removel of oysters and not upon the shells after oysters are removed.

Opinion by Assistant Attorney General Small.

Attention: Hon. George A. Sossaman.

Dear Sir:

I have your letter of December 19, 1935 requesting my opinion as follows:

"The Board of Revenue and Road Commissioners of Mobile County have directed me to request your opinion upon the following subject:

"Does the tax of 3c per barrel of oyster shells, have to be paid upon shells, purchased by Mobile County for use in building and repairing roads?

"The present act will be found in General Acts of Alabama 1933, page 111 and is a supplement to the Act in General Acts of 1923 page 672. The county can purchase these shells for 2c per barrel plus the tax. If the county has to pay the tax the cost will be prohibitive but if it does not it can very profitably use these shells to build certain roads."

In reply, I wish to advise that Section 2, Acts of 1933, page 111, the only section of this act imposing a tax provides as follows:

"In lieu of the taxes of five cents a barrel on oysters as provided by Act of the legislature approved October 1, 1923, there is hereby imposed a tax of three (3) cents a barrel on oysters and in addition thereto twenty-five percent of all oyster shells so removed from all beds and bottoms in counties having a population of more than 50,000 inhabitants according to the last or any subsequent Federal census shall, under the direction of the Commissioner of Game and Fisheries or his duly authorized agent, be returned to waters of Alabama by the dealer, oyster canner, or person, firm or corporation purchasing or receiving oysters for commercial purposes."

You will observe that the tax here imposed is three (3) cents a barrel on oysters - - - so removed from all beds and bottoms."

In my judgment, this section must be considered in the light of legislative purposes and intent as found from a conclusion of the act as a whole. Sections 4, 5, 6, 7, and 9½ all regulate the removal of oysters from beds or bottoms in certain counties contemplated by the act. Section 8 provides for penalties for violations of the provisions of this act. Section 9¾ regulates shipping all oysters and requires replanting of shells, and the final sections 9 and 10 of the act provide for the enactment of any part of the act if the remaining parts be declared unconstitutional and the effective date of the act, respectively.

It will readily be seen that the legislative intent and purposes of this act may be said to be conservation of oysters.

Premises considered, it is my opinion that tax imposed by Section 2 of the above quoted act is a tax on removal of oysters and not upon the shells after the oysters have been removed. It is, therefore, my opinion that your question should be answered in the negative.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 17, 1936.

Hon. C. H. Keller, Register,
Circuit Court of Cullman County,
Cullman, Alabama.

In an injunction proceeding seeking to abate a liquor nuisance, where there is a dismissal of the case by the State, but the order of dismissal fails to adjudicate the costs against either party, the State could not be made liable for same.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of January 2, 1936, in which you request my opinion as follows:

"There has been filed in the Circuit Court in Equity of this County several injunction cases in which the State of Alabama is complainant against persons operating liquor nuisances, and there are now several of these cases pending in this court.

"Eventually these cases will probably be dismissed by the State on account of the nuisance being abated by reason of the removal of the person operating the nuisance from the premises subject to the injunction, the going out of business by the person operating such nuisance or in some instances due to death of the operator of the nuisance.

"In above mentioned cases where such cases are dismissed on motion of the State and no mention is made by the Court against whom costs are to be taxed please advise against whom execution is to issue or from what source the court cost, i. e. trial tax, sheriff's fees and register's fees are to be collected."

Where the statute fixes the method of payment of costs it must be followed. It is my opinion the cost arises in injunction cases where a liquor nuisance is sought to be abated, the action is quasi criminal, as was observed by Justice Somerville in the case of Edmunds vs. State ex. rel. Edge, 74 So. 956. Cases of this character are actions in rem. and not in personam, and are penal in their nature. Justice Somerville says in this connection.

"Before proceeding to a discussion of the several contentions of the claimant, it is desirable to observe the motive and status of this proceeding. Though a proceeding for search and seizure is not 'in any exact sense a criminal prosecution.' as observed in Toole vs. State, 170 Ala. 41, 46, 54 South 195, yet it is strictly penal in its character, and substantially resembles a criminal prosecution; the only practical differences being that it acts in rem instead of in personam, and is conclusive against the whole world. Like a bastardy proceeding (Paulk v. State, 52 Ala. 427;

Shows v. Solomon, 91 Ala. 390, 8 South, 713), it is sui generis, and may be properly designated as quasi criminal (Woolen & Thornt. Int. Liq. Section 600; Black on Intox. Liq. Sec. 352.) Certainly it is not a suit according to the course of the common law, and would not, either in ordinary or technical language be classed among civil actions. State vs. One Bottle of Brandy, 43 Vt. 297."

Therefore, in view of what is said in the above cited case, we are of the opinion that if there is an order of dismissal in an injunction proceeding which seeks to abate a liquor nuisance, that such order of dismissal should designate where the costs must go, and a judgment should be rendered in accordance with such order. The Court failing to do this, even though the case is dismissed by the State as you state in your request, the State could not be required to pay the costs, there being no judgment for same.

I call your attention to the case of Greene County vs. Hale County, 61 Ala. 72, and I might add here this case does not appear to have been revised or overruled by any subsequent holding of the Court, that I am able to find. This case holds in part as follows:

"Costs; liability of State or County for.—Neither the State nor the several counties thereof, are liable for costs incurred in the prosecution of offenders against the laws, except to the extent, and in the manner, provided by statute."

It is therefore my opinion, there being no decree or judgment for costs against the State in the case you refer to, the State cannot be charged and made liable for same.

Yours truly,
A. A. CARMICHAEL,
Attorney General.

January 18, 1936.

Hon. H. W. Clayton,
Clerk of the Circuit Court,
Marshall County,
Guntersville, Alabama.

1. Clerk of Marshall County Court need not present requisition to purchasing board for letterheads, stamps and blanks. (Bill No. 492, General Acts 1935).

2. Fine and Forfeiture Fund—Clerk and Sheriff entitled to claims from, where nolle prosequi entered in felony cases.

3. Fine and Forfeiture Fund—Costs and fee properly paid from, in cases transferred from County and Circuit Courts to Juvenile Court.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of December 12, 1935, in which you request my opinion as follows:

"Please give me an opinion as to whether Clerk of Circuit Court has the authority to buy his office supplies, such as stamps, letterheads and

blanks for the office and record books, without a requisition furnished to the Purchasing Agent of the Board of Revenue, (Bill No. 492), (H. 1073, Coleman) Sec. 13, Approved September 13, 1935, (Local Bill for Marshall County.)

"Please give me an opinion as to where the Clerk and Sheriff are entitled to any fine and forfeiture claims in felony cases placed on the County Court Docket and then nol prossed by the Probate Judge in cases such as Peace Proceedings, attempts to murder, seduction etc., and if the Clerk and Sheriff are entitled to Claims on cases where any cases are transferred to Juvenile Court."

Your first inquiry must require a negative reply. I call your attention to Section 5 and to Section 13 of the Act mentioned in your query.

Section 5 provides that the Board of Revenue created by the Act shall have power "to provide for purchase of necessary books, stationery, telephones, postage, telegrams, telephone calls for the use of all county officers, and said Board of Revenue in the conduct of its official business * * * ."

The pertinent parts of Section 13 are as follows:

"Requisition shall be submitted for such supplies and material by the engineer and by other officers of said County to the Board of Revenue (the chairman of such Board of Revenue elsewhere in Section 13 is constituted County Purchasing Agent) and shall be passed upon and approved by the Board at either a general or special session before any purchases shall be made by said purchasing agent, **except for letterheads, stamps and blanks for the officers of the County.** * * *."

Further, "the word 'supplies' shall be deemed to include all machinery, implements, material, supplies, stationery, and office supplies for all offices, departments, and activities of the county * * * ."

It is to be seen from the foregoing, therefore, that it is not necessary for a requisition to be furnished by the County official when purchasing letterheads, stamps and blanks. Accordingly, the Clerk of the Circuit Court has authority to buy stamps, and letterheads and blanks for the office without requisition furnished to the purchasing agent of the Board of Revenue.

Your second inquiry should receive an affirmative answer. This office has repeatedly held that where a nolle prosequi is entered in a criminal case, the costs and fees of such case are properly payable from the Fine and Forfeiture Fund under Section 4039 of the Code of Alabama 1923. Biennial Report, Attorney General 1928-30, page 132; Opinion of Attorney General (Office Edition) Book 13, page 83; Opinions Attorney General (Office Edition) Book B, page 77.

In answer to your third inquiry, I call your attention to an opinion of this office to the Hon. J. R. Hardy, Sheriff, Chilton County, Clanton, Alabama, of June 12, 1935 (copy of which is herewith enclosed for your convenience), in which the matter raised by you is thoroughly examined. It was there held that costs and fees in cases transferred from County and Circuit Courts to the Juvenile Court are proper charges against the Fine and Forfeiture Fund of the County.

Yours very truly,
A. A. CARMICHAEL,
Attorney General,

January 18, 1936.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Taxation—Tax Sales

Probate Judge legally may become purchaser at the tax sale of lands in which he owns interest, notwithstanding Section 270 of Revenue Compilation of 1929 (Section 261, Acts 1919, page 282).

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion dated December 30, 1935, as follows:

"Section 270 of the Revenue Compilation of 1929 found on page 165 reads in part as follows:

" 'If the Assessor, Collector, Judge of Probate or any county Tax Assessor shall directly or indirectly, be concerned or interested in the purchase of any real estate sold for taxes, the sale shall be void.'

"In the examination of the records of the Tax Collector of Jackson County, it is noted that the then Judge of Probate, Hon. J. M. Money, purchased certain real estate for delinquent taxes, this sale, however, being made to him as 'Mortgagee'. The sales docket shows that subsequently deed was executed to him as 'J. M. Money, Mortgagee'."

In my opinion, there is no violation of the Section quoted in part in your inquiry.

This statute is highly penal and should be strictly construed in favor of persons sought to be subjected to its operation. Anderson v. City of Birmingham, 205 Ala. 604, 88 So. 900. See also Alabama & Southern Digest Volume 25, title "statutes", Key Number 241.

The obvious intention of the Legislature in the enactment of Section 270, supra, was to discourage the named officials from generally dealing in lands sold for delinquent taxes. It ought not to be extended by construction to include cases wherein the act of the officer in becoming the purchaser at such sale is in fact merely in protection of a direct interest which he has in the land sold.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 22, 1936.

Hon. Frank M. Stewart, Secretary,
State Milk Control Board,
Montgomery, Alabama.

State Milk Control Board—

Applicants for license who are producers of milk or distributors in localities where no health regulations exist may be granted license under H. B. 311—Hamner, upon offering proof from State Health Department that no health regulations exist in their respective localities.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of December 30th, 1935 in which you request my opinion as follows:

"Section 4 of the Milk Control Act, approved July 9, 1935, provides that the Attorney General shall be the Legal Advisor of the State Milk Control Board in matters relating to the powers and duties of the Board.

"Your opinion is requested on the following question. Does the Milk Control Board have authority to collect license fees and issue licenses to producer-distributors who do not operate under a permit from either State or County health units, where there are no health regulations in force?

"We are enclosing four applications from producer-distributors applying for licenses, and you will note that the Health Officer states that these applicants do not have a Health Permit, and that there are no health regulations in force in the section where these applicants are producing and selling milk.

"Kindly give us your opinion as soon as possible, in order that we may make some disposition of this matter."

In reply, I wish to advise that H. B. 311—Hamner Section 10 provides concerning applicants having license with the State Milk Control Board as follows:

"Each application for a license shall be in writing under oath, a certificate from the State or County Board of Health in the Milk-Shed where he desires to do business that he has and is complying with the health regulations of such Milk-Shed must accompany the application."

You state in your request that "no health regulations are in force in the section where these applicants are producing and selling milk." In my opinion, if there are no health regulations in force in the particular locality where these dairymen are producing and selling milk, of course, there are no regulations for them to meet and they will have met the requirements of the act when they offer proof from the State Department of Health that there are no health regulations in force and that it therefore becomes impossible for the required certificate to be furnished.

In my opinion, applications from these dairymen accompanied by affidavits or certificates from the State Department of Health that no health regulations are in force in their locality would permit you to issue a license to them if they have met all other requirements of the law relative to issuance of licenses.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 22, 1936.

Hon. E. A. Hammett,
Judge of Probate,
Talladega, Alabama.

The Fine and Forfeiture fund of the various counties of the State is not subject to the Budget Act approved Sept. 9, 1935, but is a separate and distinct fund specified for a separate and distinct use.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of November 23, 1935, in which you request my opinion as follows:

"I would appreciate you advising me whether in your opinion the provisions of Act numbered 379, Alabama General Laws, Regular Session, 1935, apply to the Fine and Forfeiture Fund of Talladega County."

My answer to your question is in the negative. The provisions of the Act you refer to only apply to such funds as the Board of Revenue, Commissioners Court or other like governing body have supervision over.

The Fine and Forfeiture Fund of the County is a separate and independent fund. It does not have any connection with the general funds of the county or any other special fund. It is not paid out by the Commissioners Court or other like governing body. Its existence is purely statutory; it does not originate from any constitutional grant.

Sanders v. Commissioners Court of Elmore County, 117 Ala. 543.
Brown and Street v. Parris, 93 Ala. 314, 9 So. 603.

This fund is a separate and distinct fund of its own peculiar nature and has no connection with any other funds of the County. It does not arise from taxation and is no part of the general fund of the county. It is not controlled or supervised by the Court of County Commissioners or like governing body. It is not paid out on warrants emanating from such governing bodies and never comes under its supervision.

I call special attention to the case of Rhodes vs. Marengo Co. 205 Ala. 667. While of course this case is not dealing with our new county budget law, but it does show the status of the Fine and Forfeiture Fund of the various counties of the State. Therefore, as stated above, it is my opinion that what is known as the County Budget and Financial Control Act of 1935, Act No. 379, has no application to this fund, and it therefore does not enter into the County budget.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 22, 1936.

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Special Judge appointed under Section 8571 may not be paid from State Treasury.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I am in receipt of your letter of recent date, stating:

"Is there any provision of law authorizing the State Comptroller to pay for services rendered by a special judge that was appointed under Section 8571 of the Code of 1923.

"If this can be done, what rate of pay is he entitled to receive?

I wish to call your attention to Sections 6719, 6720 and 10299 of the Code of 1923."

There is no provision by which the State Comptroller is authorized to pay for services rendered by a Special Judge appointed under Section 8571 of the Code of 1923.

While Section 160 of the Constitution provides for the appointment of a Special Judge, under the conditions set forth in said section, no compensation is provided. Section 6720 of the 1923 Code provides only for the payment of Special Judges where the Governor has issued a commission. Section 10299 of the Code provides for the expense of regularly elected Judges. Neither these nor any other Sections of the Code or Statutes make provision for the payment of Special Judge under Section 8571 of the Code.

As funds cannot be paid from the Treasury except upon definite authority, I am of the opinion that payment cannot be made in this case.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 22, 1936.

Hon. Wm. F. Black, Director,
Transportation Bureau,
Alabama Public Service Commission,
Montgomery, Alabama.

Motor vehicles—Taxation—Certain Non-resident contract carriers may enter State by complying with Schedule 158.15 without obtaining permit required by Section 5, H. B. 113, (General Acts 1932, p. 180).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of January 8, 1936, in which you state the following facts:

"Schedule 158.15 of an Act to provide for the general revenue of the State of Alabama, approved July 10, 1935, (H. B. 324) provides among other things, that motor vehicles of non-residents used for hire and making not more than three trips during any period of three months in this State and which pay all mileage taxes required by law, may secure a permit from the State Tax Commission under such rules as the State Tax Commission may prescribe and upon the payment of a $5.00 fee for each trip to the said State Tax Commission, etc.

"An Act of the Legislature of Alabama, approved October 28, 1932, (H. B. 113) General Acts of Alabama, Extra Session, 1932, page 178, Act 159, provides, among other things, that motor carriers operating for hire must obtain from the Probate Judge of one of the several counties a motor carrier permit before operating on the highways of this State."

In view of the above facts, you request my opinion as follows:

"Assuming that a particular carrier is a non-resident contract carrier and is subject to the 1932 Act referred to above, may he enter the State by complying with the provisions of the 1935 Act referred to above without having obtained in the usual manner a motor carrier permit in accordance with the terms of the said 1932 Act?

"Some interested parties have adopted the view that a non-resident carrier may comply with the provisions of the 1935 Act, pay the proper mileage taxes to the State of Alabama and proceed to enter the State without complying with the provisions of the 1932 Act."

In my opinion, your inquiry should be answered in the affirmative.

Schedule 158.15 of the Revenue Bill of 1935 provides in part as follows:

"Provided that motor vehicles of non-residents used for hire and making not more than three trips during any period of three months in this State and which pay all mileage taxes required by law, may secure a permit from the State Tax Commission under such rules as the State Tax Commission may prescribe and upon the payment of a $5.00 fee for each trip to the State Tax Commission, etc."

Your attention is directed to Schedule 158.18 which states that:

"The registration fee or license tax herein required to be paid, on motor vehicles shall be in lieu of all other privilege or license taxes which the State, **or any county** or municipality thereof might impose, where the motor vehicle is used by the owner."

Premises considered, it is my opinion that such a non-resident carrier, making not more than 3 trips during any period of three months in the State, may comply with the provisions of Schedule 158.15 of the Revenue Bill of 1935, pay the proper mileage taxes to the State of Alabama and proceed to enter the State without complying with Section 5 of H. B. 113 (General Acts of Alabama, 1932, p. 180).

Yours very truly,
A. A. CARMICHAEL
Attorney General.

January 22, 1936.

Hon. Cecil H. Strawbridge,
Deputy Solicitor, Lamar County,
Vernon, Alabama.

Court of County Commissioners—May designate offices in the courthouse for installation of telephone service.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"Under a local bill approved June 3rd, 1935, for the deputy Solicitor of Lamar County, to represent the County, the State in Justice of Peace

Court and all the incorporated Towns in Lamar County the County Court of Commissioners voted to pay the expense of a telephone for the office of the deputy Solicitor.

"I will appreciate you advising me whether the County would be justified in paying for the telephone if they thought it would save the County money."

In my opinion your inquiry must be answered in the affirmative

Acts of 1933 page 201 (Act No. 187) provides:

"That Boards of Revenue or Courts of County Commissioners may designate which offices in the Court House may have telephones installed therein."

If the Deputy Solicitor has an office in the court house of the county, telephone service may be provided for such office by the Court of County Commissioners.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

January 22, 1936

The County Board of Education,
Montgomery County,
Montgomery, Alabama.

Attention of R. T. Goodwyn, Jr.,
Attorney for the Board of Education.

Montgomery County—County Board of Education may lease public school buildings not required for the operation of the public schools of the county for private school purposes.

Opinion by Assistant Attorney General Rowe.

Gentlemen:

Receipt is acknowledged of your request for opinion dated January 21, 1936, as follows:

"1. Can the County Board of Education of Montgomery County rent or lease public school buildings of said county so that same may be used for private school purposes?

"2. If the above question is answered in the affirmative and the school buildings are so leased, can the lesses in their discretion determine the students who can come to said school and the students who can be excluded therefrom?"

In my opinion, your first inquiry must be answered in the affirmative. Section 132 of the School Code of 1927 as amended by Act No. 85 approved March 23, 1933 (State Department of Education Bulletin No. 2, 1934, p. 322), specifically provides such authority for such County Boards generally and Acts 1931, page 438 provides like authority for consolidated City-County Boards of Education, such as the Montgomery County Board.

Of course, in renting or leasing public school buildings, the County Board of Education must necessarily be guided by whether or not the buildings

which it proposes to lease are required for public school purposes in the county. Any property owned by the County Board of Education which is not being devoted to public school purposes may be rented or leased. Cf **Jackson v. Ball,** 217 Ala. 273.

Your second question must also be answered in the affirmative. Upon the execution of a contract of lease or rent, the County Board of Education would, for the term thereof, part with any right to control of the property.

The lessee may determine the number of students and even the individual students which might be admitted to a private school operated in a building belonging to the County Board of Education so leased.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 23, 1936.

Hon. Matt A. Boykin,
Judge of Probate,
Mobile County,
Mobile, Alabama.

Taxation—Redemption

Where the Probate Judge issues decree for sale of lands for taxes without including interest to the date of such decree, and the time for appeal elapses, he or the succeeding Probate Judge is without authority to set such decree aside or to issue a suuplemental decree to include such interest.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of sometime ago in which you state:

"Previous to the death of Probate Judge Price Williams of Mobile County he signed several decrees for land redemption. These decrees failed to include the interest from the date of delinquency to the date of sale.

"Will it be incumbent of me as present Probate Judge of Mobile County to issue a supplemental decree including all interest from the date of delinquency to the date of sale, or does my responsibility end with collecting the stipulated amount as shown by the decrees of the former Probate Judge?"

Also your recent letter again calling this matter to my attention.

It is my judgment that the decrees having been duly entered and signed, there is no authority for you to set them aside or issue a supplemental decree to include the interest. Clearly such interest should have been included but presumably the court in rendering the decree found the proper amount due and, in the absence of an appeal, I doubt if there is any authority to set such decree aside or to render an additional decree.

Section 269 of the Revenue Act of 1935 provides in part as follows:

"In order to obtain the redemption of land from tax sale where the same has been sold to the State, the party desiring to make such redemption shall deposit with the Judge of Probate of the county in which the land is situated **the amount of money for which the lands were sold, etc.**"

Section 291 states in part that "Whenever any real estate has, prior to January 1, 1935, been sold for taxes and bid in by the State at tax sale, the same may be redeemed in **the same manner as heretofore provided** for sales made after January 1, 1935 except that the following additional provisions shall apply."

It will be noted that the basis of the redemption is the amount for which the lands were sold. Presumably this included interest to the date of sale, but if the decree failed to include interest, I do not think the proper remedy is by a supplemental decree, or by setting the decree aside after the time for appeal has elapsed.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 23, 1936.

Hon. C. S. Tompkins, Chairman,
County Commission,
Baldwin County,
Bay Minette, Alabama.

Counties—May issue refunding warrants under the provisions of Act No. 379, H. B. 191, approved September 9, 1935, known as the County Financial Control Act, to pay accounts due State for examination of accounts of county officers under Section 749, Code of 1923. State has discretion as to acceptance of said refunding warrants. Baldwin County may invest sinking fund in its warrants under Local Acts 1931, p. 100.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of January 3, 1936, which reads as follows:

"Under the Lee Act of the recent Legislature being House Bill No. 191, the County Commission of this County budgeted its funds and expenses for the fiscal year commencing October 1st, 1935, and in the budget of expenditures failed to include the sum of approximately $3,000.00 owing to the State of Alabama for examination of its public officer's accounts, the examinations having been made in 1932.

"Under the Lee Act the County is authorized to borrow in anticipation of collection of its taxes 95 per cent of the moneys borrowed on such anticipation for the preceding fiscal year. Preceding the fiscal year the County borrowed $20,000.00. In setting up its budgets for the current fiscal year the County included as an item of revenue 95 per cent of its last year's anticipation, namely, $19,000.00. Its entire income, including estimated taxes and authorized anticipations, is consumed by the budgeted expenses.

"The County exceeded its debt limit several years ago. The Lee Act also provides for the issuance of Refunding Warrants for indebtedness outstanding as of October 1st, 1935.

"Under the Act creating the County Commission of Baldwin County, Local Acts 1931, page 101 et seq. (page 104), the Commission is authorized to invest its Sinking Fund created for the payment of its outstanding bonds in interest bearing securities of the County of Baldwin. The County has money in the Sinking Funds for its outstanding road and bridge bonds.

"Please advise:

"First: (a) Whether or not the County may issue Refunding Warrants under the Lee Act for this debt due the State of Alabama.

(b) Whether or not the County may purchase these Refunding Warrants for its Sinking Fund.

(c) Whether or not the County may issue such warrants and deliver them to the State in settlement of said debt.

"Second: (a) Whether or not the Emergency clause of the Lee Act the County may issue Anticipated Tax Warrants for the purpose of raising money to pay this debt due the State.

(b) Whether or not it may purchase such Anticipated Tax Warrants on behalf of its Sinking Fund.

(c) Whether or not it can deliver such Anticipated Tax Warrants to the State in settlement of this debt."

I am of the opinion that subhead (a) of your first inquiry should be answered in the affirmative. This office has heretofore ruled that Sections 9 and 10 of Act No. 379, H. B. 191, approved September 9, 1935, known as the "County Financial Control Act," which provide for the issuance of refunding warrants are applicable to valid outstanding claims against the county due and unpaid as of October 1, 1935, except bonded indebtedness, whether same are in the form of warrants or not.—**Opinion to Judge of Probate of Clarke County on November 16, 1935.** The claim under present consideration seems to be open account claim of the State for auditing accounts of county officials under Section 749 of the Code of 1923, which was due and unpaid as of October 1, 1935.

I am of the opinion that subhead (b) of your first inquiry should be answered in the affirmative. The authority of Baldwin County to invest its sinking fund in its county warrants is authorized specifically by Section 6 of Act No. 239, H. B. 597, approved May 29, 1931 (Local Acts 1931, p. 100), which defines the powers and duties of the County Commission of Baldwin County. The pertinent part of Section 6 is as follows:

" * * * to set aside, appropriate and use such part of the revenue of the County as may be deemed expedient for the purpose of creating a sinking fund for the payment of bonds or other indebtedness, and to invest such sinking fund in interest bearing securities of the United States, the State of Alabama, or of the County of Baldwin or any other County or Municipality of this state, or deposit the same on interest bearing account, within the State, as said Commission may deem wise, * * * "

The answer to subhead (c) of your first inquiry is governed by an opinion of this office rendered to County Treasurer of Conecuh County on November 20, 1935. Said opinion, in answer to an inquiry as to whether the

holder of a county warrant must accept a refunding warrant in lieu thereof, stated as follows:

"In answer to your inquiry, I am of the opinion that the holder of the warrants in question need not accept refunding warrants in lieu thereof if his rights would be prejudiced thereby.—**Rhodes v. Marengo County Bank,** 205 Ala. 667, 88 So. 850. This presents a question of fact involving the financial condition of the county, the status of the warrants in question in the matter of preferences, and the items included in the budget for the present fiscal year."

The above principle is applicable to the holder of claims against a county whether same have been put in the form of warrants or not.

The above answer to the subheads of your first inquiry renders unnecessary the answering of your second inquiry. Since the county may issue refunding warrants for the claims in question, it will be unnecessary to resort to Section 17 of the County Financial Control Act dealing with "Emergencies."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 23, 1936.

Hon. Chas. E. McCall,
State Auditor,
Capitol.

Calculating machine for State Auditor's office may be paid for out of appropriation for supplies and materials for said office.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of January 7, 1936, in which you state:

"Finding need for a Calculating Machine in my office, I wish to make requisition therefor from the Purchasing Department.

"Under the Appropriation Bill, Governor's No. 373, House No. 249 Harrison, approved September 6, 1935, and under third division thereof, 'Auditor's Office', there is appropriated for supplies and materials $762.50." You request my opinion:

"Please advise me whether or not the Calculating Machine may be legally paid for from this particular appropriation."

It is my opinion that your question should be answered in the affirmative. In my opinion the word "supplies" as used in part II of Act No. 373, H. B. 249, approved September 6, 1935, (General Acts 1935) means all office supplies reasonably necessary to maintain the office in a modern up-to-date manner, corresponding with offices of similar character responsible for a like amount of work. I think that a calculating machine in the Auditor's office is absolutely necessary, for without such a machine the Auditor might be placed at a tremendous disadvantage in keeping up with his routine duties.

In Harrison v. State, 102 Ala. 170, 15 So. 563, the Court said: "Words are to be construed in their popular sense, the plain sense in which the people generally understand them, unless it plainly appears from the writing in which they appear that they were intended to be employed in some other sense."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 23, 1936.

Hon. Winston Stewart,
Judge of Probate, Coosa County,
Rockford, Alabama.

Statutes—Act No. 357, Acts of 1935 Legislature, approved September 7, 1935 is unconstitutional and void as violative of Section 96 of the Constitution of Alabama of 1901.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of November 13, 1935, as follows:

"Senate Bill 377 approved September 7, 1935, in substance provides in Section 1 thereof that each member of the Court of County Commissioners in Counties having a population less than 15,000 shall be paid for their services $47.50 for each calendar month. Section 2 of that Act provides further that this salary shall be in lieu of all other fees, salaries and compensation of the several officials named in Section 1 of this Act. Section 4 provides that the act is effective the first day of the month after its passage and approval.

"I desire to know if this Act is applicable to the County Commissioners of this County who were in office at the time the Act became effective. What effect, if any, does Section 281 of the Constitution of Alabama have on the Act above mentioned?

"Does the above described Act violate any other provision of the Constitution of Alabama?"

In answer to your inquiry as to whether Act No. 357, Acts of 1935 Legislature, approved September 7, 1935, violates any provisions of the Constitution of Alabama, 1901, I wish to advise that it is my opinion that the said Act violates Section 96 of the Constitution of Alabama, 1901, and is therefore, unconstitutional and void.

Section 96 of the Constitution of 1901 reads as follows:

"The legislature shall not enact any law not applicable to all the counties in the state, regulating costs and charges of courts, or fees, commissions or allowances of public officers."

In 1927, the legislature passed a Local Act for Coffee County, which provided among other things that:

"Each County Commissioner shall receive while engaged in attending on the Board of County Commissioners or the duties of the office the

sum of $5.00 per day, which shall be in lieu of all other compensation paid him by the County."

The general law applicable to the pay of County Commissioners throughout of the State at that time was Section 6771 of the Code of Alabama, 1923.

The Supreme Court of Alabama in the case of Carnley v. Moore, 218 Ala. 274 at 276, declared the Local Act described above unconstitutional and void as violative of Section 96 of the Constitution and subsection 24 of Section 104 of the Constitution. It said:

"The provisions of the Act, under which salary, fees, or compensation of petitioner is sought to be compelled of payment by mandamus or as a local act, are violative of section 96 of the Constitution denying the right of the Legislature to enact a law not applicable to all the counties of the state, regulating costs and charges of courts, or fees, commissions, or allowances of public officers, Birmingham Elec. Co. v. Harry, 215 Ala. 458, 111 So. 41; Vaughan, Judge of Probate v. State ex rel. Barker, 212 Ala. 461, 103 So. 38, and was an allowance to a public officer within the inhibition of subsection 24 of section 104 of the Constitution, Brandon v. Askew, 172 Ala. 160, 54 So. 605; Osborn v. Henry, 200 Ala. 353, 76 So. 119; Jackson, Clerk v. Sherrod, Dep. Sol., 207 Ala. 245, 92 So. 481."

The Act here in question is very similar to the Local Act under consideration in the case of Carnley v. Moore, supra. Like the Act there declared invalid, it provided different compensation for the members of the Court of County Commissioners from that provided by the general law on the subject. The general law now applicable to the pay of County Commissioners throughout the State is Section 6771 of the Code of Alabama 1923, as amended by an Act of the 1931 Legislature, pp. 805, 806, approved July 31, 1931. Therefore, it is my opinion that the Act No. 357, supra, is unconstitutional and void as violative of Section 96 of the Constitution of Alabama of 1901.

It is true that the Act here in question is not a local act as was the act invalidated by the Supreme Court in the case of Carnley v. Moore, but rather is a general law with a local application, based on a classification according to population. It applies only to those counties of the State which now have or may hereafter have a population of less than 15,000, and, as a matter of fact, is only applicable to the counties of Cleburne and Coosa. But the Supreme Court has held a number of times that acts dealing with different "costs and charges of courts, or fees commissions or allowances of public officers" which were based on a classification according to population were invalid as in violation of Section 96 of the Constitution of 1901 since they were "not applicable to all counties in the state". Vaughan, Probate Judge, v. State ex rel. Barker, 212 Alabama 461; Mobile County v. Byrne, 218 Ala. 5, Crow v. Board of School Commissioners of Mobile County, 228 Ala. 107. Therefore, it may be seen that a general law with a local application, based on a classification according to population, regulating "costs and charges of courts, or fees, commissions, or allowances of public officers" is violative of Section 96 of the Constitution of Alabama 1901 just as is a local law on that subject.

Since the Act No. 357, supra, is unconstitutional on the above mentioned ground, namely ,as being in violation of Section 96 of the Constitution, it becomes unnecessary for us in this opinion to determine whether or not it also violates any other provisions of the Constitution.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 29, 1936.

Hon. Chas. E. Bragg,
Judge of Probate,
Lawrence County,
Moulton, Alabama.

Counties—County Bonds, Lawrence County—

Under the terms of amendment No. 5 authorizing Lawrence County to issue bonds for the building of a courthouse, the County Governing Body should determine and make public the cost of the construction and equipping of the courthouse, the time of its completion, the amount of the increased indebtedness of the county by reason of the issuance of said bonds, the rate of interest to be paid thereon and the period over which the bonds to be issued will be refunded before calling the election to authorize the issuance of such bonds.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of January 17, in which you state:

"I, respectfully request your opinion on the following question.

"Whether or not County Governing Body of Lawrence County, Alabama, is authorized under the provision of the Constitution Amendment number five submitted to a vote of the people of the State, on December 17th, 1935, to submit to a vote of the people of Lawrence County, Alabama the question authorizing the County Governing Body to contract for, construct and equip a Courthouse in said County without first determining and publishing the cost of said Construction and equipping of said Courthouse proposed to be built?

For your convenience and consideration I hereto attach a copy of the ballot showing the proposed amendment number five as adopted by the voters on December 17, 1935.

"Inasmuch as the amendment provides the election shall be held in Lawrence County, not more than one hundred sixty days after the adoption of the amendment, I, respectfully ask that you give this question immediate consideration."

You attach copy of the Amendment recently voted upon by the people of the State. This Amendment provides in part:

"But no such additional indebtedness shall be incurred, no such bonds shall be issued and no such tax shall be levied until the estimated cost of the construction and equipping of said Courthouse hereby proposed to be built, its time of completion, and the amount of the increased indebtedness, the rate of interest to be paid thereon, and the period over which the bonds to be issued will be refunded, shall have been determined upon and made public by the County Governing Body of said County; and the proposed increase in indebtedness and the issuance of bonds and the increase in rate of taxation first shall have been authorized by a majority of the qualified electors of said County voting upon such proposal, etc."

It is my judgment that the County Governing Body must determine and make public the estimated cost of the construction and equipping of the

Courthouse, the approximate time of completion, the amount by which the indebtedness of the County will be increased, the rate of interest to be paid,, the period over which the bonds to be issued will be refunded and the rate of the tax, and that these facts should be determined and made public prior to the calling of the election.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 29 ,1936.

Hon. J. H. Holland, Chairman,
Board of Registrars,
Winston County,
Haleyville, Alabama.

Registration—Voting—Residence of two years in the State and one year in the County next preceding the next general election required for registering and voting.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of January 18, 1936, in which you request my opinion as follows:

"Please advise me on the following:

"Mr. Roy V. Whatley left Winston County, went to Arkansas, voted there. He has returned and has been in Alabama two years. You advised us to strike him and register him. We have him listed to strike the second Monday in February. We meet the fourth Monday in January to register, can we register him and put his name on the book before we strike him off the list?"

In reply, I wish to advise that in my opinion, one who has changed his citizenship from Alabama to another State and later returns to Alabama with the intention of becoming a citizen may register if he will have at the time of the next general election the constitutional requirements of residence and is not otherwise disqualified as an elector.

The constitutional requirements of residence for registration are found in Section 178 of the Constitution as follows:

"Section 178. To entitle a person to vote at any election by the people, he shall have resided in the state at least two years, in the county one year, and in the precinct or ward three months, immediately preceding the election at which he offers to vote, and he shall have been duly registered as an elector, and shall have paid on or before the first day of February next preceding the date of the election at which he offers to vote, all poll taxes due from him for the year nineteen hundred and one, and for each subsequent year; provided, that any elector who, within three months next preceding the date of the election at which he offers to vote, has removed from one precinct or ward to another precinct or ward in the same county, incorporated town, or city, shall have the right to vote in the precinct or ward from which he has so removed, if he would have been entitled to vote in such precinct or ward but for such removal."

I gather from your letter that you expect to purge this man's name from the poll list because of his former change of citizenship to Arkansas. If I am correct in this interpretation of your letter, in my opinion he would be subject to being stricken from the poll list, but if he shall have lived in Alabama for two years next preceding the next general election in which he will be allowed to vote and has not changed his residence by that time, he should be permitted to register and to vote. I refer you to the case of Shepherd v. Sartain, 64 So. 57. I wish to further refer you to an opinion of the Attorney General rendered to Hon. Charles E. McCall, State Auditor under date of January 29, 1936, and authorities cited therein, a copy of which I enclose for your convenience.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 29, 1936.

Hon. C. D. Rutherford, Chairman,
Board of Registrars,
Russell County,
Hatchechubbee, Alabama.

Voters—Voters should offer proof to Board of Registrars proving residence qualifications in Alabama and in the county in which said voter claims to be a qualified elector.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of January 8th, 1936 in which you request my opinion as follows:

"Will you kindly advise me how the Board of Registrars, shall be guided in answering the following question which will be asked them on the second Monday in February, when the Board meet as required by Law?

"In cases where it has been ascertained from reliable information that certain parties have moved out of the state and county, and where the sheriff has been given notices to serve them, to show cause why they should not be stricken from the voting list, and they then state that Russell County is their home, what is valid proof that they may offer to show, in order that they may continue citizenship in Russell County."

In reply, I wish to advise that your request involves both questions of law and facts. I refer you to the case of Lucky v. Roberts, 211 Ala. 578 and authorities therein cited in which the Court said:

"What state of facts constitute a change of domicile is a mixed question of law and fact."

In those cases where "certain parties have moved out of the state and county," and they say that Russell County is their home, the question for decision is whether or not their "legal residence" for purposes of registering and voting has been changed.

Upon removal from the state, a voter may or may not lose his legal residence in Alabama, dependent upon whether or not his removal is accom-

panied by the intention of making it temporary or permanent. Section 366 of the Code of 1928 provides as follows:

> "Residence not acquired or lost by temporary absence.—No person shall lose or acquire a residence either by temporary absence from his or her place of residence without the intention of remaining, or by being a student of an institution of learning, or by navigating any of the waters of this state, the United States, or the high seas, without having acquired any other lawful residence, or by being absent from his or her place of residence in the civil or military service of the state, or the United States; neither shall any soldier, sailor or marine, in the military or naval service of the United States, acquire a residence by being stationed in this state."

The question of whether or not a voter intended his residence to be changed temporarily or permanently must necessarily decide the question of loss of legal residence in Alabama. I refer you to the case of Curry v. Barnes, 76 So. 22, 200 Ala. 256 and authorities cited therein in which the court said:

> "Legal residence may be said to be that in which a person's habitation is fixed without any present intention of removing. It embraces
>
> (1) the fact of residence (2) the intention to remain."

In deciding this question, consideration must be given to the declaration of the voter as to the intention and to his actions tending to prove or disprove such intention. In the case of Griffin v. Wall 32, Ala. 149, the court in considering this question said:

> "What a party says on leaving home, or immediately previous thereto, or while on a journey, explanatory of the act or object of leaving or performing such journey is admissible evidence as part of res gestae whenever the act itself is material evidence. So, as a general rule, whenever in any controversy, it is permissible to prove any act of a third person, the declaration of such person accompanying the act and explanatory thereof are also admissible. What degree of credit the accompanying declaration shall receive must depend on their reasonableness and consistency."

See Pitts v. Burroughs, 6 Ala. 723; Stallings v. Newman, 26 Ala. 300 (Am. Dec. 723); Gillespie v. Burleson, 28 Ala. 551; Scott v. State, 300 Ala. 503.

If a voter goes to another county for a temporary purpose only and with the intention of returning, this does not work a change of domicile nor a forfeiture of his right to vote in his own county he is presuming to retain his present residence until a new one is gained facto et animo. See Lucky v. Roberts, supra.

See also Clary v. Sanders, 43 Ala. 295.

In my opinion the individual who seeks to prove Russell County as his domicile and legal residence shall offer proof that he has not removed from the county or the state with the intention of acquiring a new and permanent domicile or residence—in other words, that his removal is temporary and that he expects to return to Russell County when the purposes of his removal are accomplished. On this question of intention, however, the declaration of the party, although admissible to prove residence, is not necessarily conclusive because it may be disapproved by his acts. See Pope v. Howle, Allen v. Cooper, 149 So. 222 in which the court said:

"(7, 8) The effect of these cases may be thus stated: When the fact of the legal residence of a citizen is once established, such fact of residence is presumed to continue, and this presumption prevails until it is established by the evidence that he has elected to or has established a residence at or in another place. It may further be stated that, while the determination of the place of legal residence of a citizen presents a question of fact, yet in determining that fact, the intention of the citizen is entitled to and must be given due consideraion in connection with his relevant acts. It is this combined result of intention and acts—speaking for the voter of his actual domicile, official residence as a citizen and as an elector seeking to cast his vote—that determines the right to vote in such precinct."

In my opinion, the Voter should offer proof that he has committed no acts which would militate against proving his required intentions of retaining his citizenship or legal residence in Russell County. It will, of course, be impossible here to enumerate all the possible acts which would militate against such intentions, but perhaps the most conclusive and common would be registration and/or voting in his new place of abode.

On this question, I wish to refer you to previous opinions of this office and authorities cited therein which in my judgment contain correct settlements of the law on this point. Biennial reports of opinion of the Attorney General, 1930-32, pages 918 and 795. Opinion to Mrs. Jessie W. Nunnelee, Chairman of Board of Registrars, Montgomery County, Montgomery, Alabama rendered on January 14, 1936, copy of which I enclose for your convenience.

Of course you understand that the Board of Registrars are acting in a judicial capacity and such evidence as will be convincing to the Board should be offered in a case of this kind.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 29, 1936.

Hon. Chas. E. McCall,
State Auditor,
Capitol.

(1) Citizenship—

Citizenship may be removed from one county to another in Alabama by open declaration followed by overt act of registration and bona fide residence.

(2) Registration—Voting—

If elector shall reside in State two years and in the county one year next preceeding the next general election, elector held to be entitled to register and to vote.

(3) Residence—State Officers—

Wife of State Officer held not to lose residence in Sumter County because of temporary residence in Montgomery County.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of January 21, 1936 in which you request my opinion as follows:

"I am writing to request your opinion in regard to the qualifications of a person for registering and voting under the following statement of facts:

"John Doe, who has been a State Officer for a number of years, and whose employment and the provisions of law have necessarily compelled him to live in Montgomery, has maintained his citizenship in Sumter County, where he is and has been a qualified elector. While serving as a State Officer in Montgomery County he married a resident of Montgomery County. After marriage and more than twelve months prior to the date of the next general election, Mrs. Doe made open declaration of her intention to become a citizen of Sumter County, and at and within the time prescribed by law appeared before the Board of Registrars of Sumter County and registered as required by law.

"If within twelve months before the next general election, Mrs. Doe has not exercised any of the privileges of citizenship in Montgomery County, under the above facts, in which of the above named counties would Mrs. Doe be entitled to register and to vote, if either, and when may she first register and vote?"

In reply, I wish to advise that your request necessitates a consideration of questions of acquiring citizenship and residence requirements, for registration and voting, in Alabama.

Questions arising from your statement of facts may be said to be:

(1) Can Mrs. Doe acquire citizenship in Sumter County by declaration of intention followed by an overt act of registration confirming this intention.

(2)Under the facts, what residence requirements must she meet in order that she may be eligible to register and to vote in Sumter County?

(3) Can she meet these residence requirements while residing with her husband, who is a State Officer, in Montgomery?

Answering these questions seriatim, I wish to advise that in my opinion Mrs. Doe could acquire citizenship in Sumter County by open declaration confirmed by an overt act of registration. Citizenship changed from one state to another or from one political subdivision of the state to another is largely a question of fact, which when measured with the law must square with the legal requirements. The Supreme Court of Alabama in the case of Pope vs. Howell, Allen vs. Cooper, 149 So. 222 (See also authorities cited therein) said of a situation of this kind as follows:

"It may further be stated that, while the determination of the place of legal residence of a citizen presents a question of fact, yet in determining that fact, the intention of the citizen is entitled to and must be given due consideration in connection with his relevant acts. It is this combined result of intention and acts-speaking for the voter of his actual domicile, official residence as a citizen and an elector, seeking to cast or undertaking to cast his vote—that determines the right to vote in such precinct."

Citizenship, in a large measure, is dependent upon actual bona fide residence. As to what constitutes residence and the necessary intention, I wish to refer you to an opinion of this office rendered on the 29th day of Jan-

uary 1936 to Hon. C. D. Rutherford, Hatchechubbee, Russell County, Alabama and to an opinion of the Attorney General rendered to Hon. W. O. Croley, DeKalb County, on February 25, 1932 reported in the Biennial Reports of the Attorney General 1930-1932, page 718, and the authorities cited therein.

Upon consideration of the above cited facts and authorities, it is my opinion that an elector may acquire residence and citizenship by open declaration to acquire citizenship followed by actual and bona fide residence. We now come to consider the question whether or not one so situated as Mrs. Doe, under the circumstances cited, supra, could acquire and hold citizenship and residence in Sumter County while continuing to reside as the wife of a State Officer in Montgomery. State Officers whose duties are in the State Capitol at Montgomery, Alabama, are required by law to live in or near the City of Montgomery. I refer you to Sec. 2577 of the Code of 1923.

Mr. Doe, being a State Officer, must necessarily reside in Montgomery if his duties are at the Capitol. It will be conceded on all hands that one of the few rights left to the husband in Alabama is that of fixing the residence of the family and it is too well known to require citation of authority, that a wife who refuses to accompany the husband to a selected residence must be guilty of abandonment. Mrs. Doe has no alternative.

The law further provides that such temporary absence from the selected domicile does not forfeit citizenship or legal residence therein. Section 366 of the Code of 1923 provides as follows:

> "Residence not acquired or lost by temporary absence.—No person shall lose or acquire a residence either by temporary absence from his or her place of residence without the intention of remaining, or by being a student of an institution of learning, or by navigating any of the waters of this state, the United States, or the high seas, without having acquired any other lawful residence or by being absent from his or her place of residence in the civil or military service of the state, or the United States, neither shall any soldier, sailor or marine, in the military or naval service of the United States, acquire a residence by being stationed in this state."

I am, therefore, of the opinion that Mrs. Doe could acquire legal residence in Sumter County as set out above and her temporary residence in Montgomery would not forfeit the acquired residence in Sumter County.

Considering now the question of when Mrs. Doe could register and vote in Sumter County, I wish to refer you to Section 178 of the Constitution and Section 381 of the Code of 1923 which provide respectively as follows:

Constitution, Section 178.

> "To entitle a person to vote at any election by the people, he shall have resided in the state at least two years, in the county one year, and in the precinct or ward three months, immediately preceding the election at which he offers to vote, and he shall have been duly registered as an elector, and shall have paid on or before the first day of February next preceding the date of the election at which he offers to vote, all poll taxes due from him for the year nineteen hundred and one and for each subsequent year; provided, that any elector who, within three months next preceding the date of the election at which he offers to vote, has removed from one precinct or ward to another precinct or

ward in the same county, incorporated town, or city, shall have the right to vote in the precinct or ward from which he has so removed, if he would have been entitled to vote in such precinct or ward but for such removal."

Code of 1923, Section 381

"Persons qualified to register.—The following persons and no others, who, if their place of residence shall remain unchanged, will have, at the date of the next general election the qualifications as to residence prescribed by section 178 of the constitution of 1901, shall be qualified under the laws of the state.—."

You will note from the above quoted provisions of the law that one who shall have resided in the state for two years and in the county for one year next preceding the next general election shall be entitled to register and to vote, provided his place of residence remain unchanged during this required period of residence.

It is therefore, my opinion that Mrs. Doe was entitled to register in Sumter County at the time as prescribed by law that she did register and that her residence remaining unchanged, she will be entitled to vote in the next general election.

I wish to further refer you to the following opinions of the Attorney General, the holdings of which conform to the interpretation of the law here announced: Opinion of February 25, 1932 to Hon. W. O. Croley, Chairman, County Board of Registrars, DeKalb County, Geraldine, Alabama, Biennial Report 1930-32, page 718; Opinion to Hon. L. H. Clark, Chairman, County Board of Registrars, Lauderdale County, Florence, Alabama, Biennial Report 1930-1932, page 705; Opinion to Hon. Thos. R. Farris, Chairman, Board of Registrars, Montgomery County, Montgomery, Alabama, Biennial Report 1930-32, page 594; Opinion to Miss Bernice F. Crumpton, Clerk, County Board of Registrars, Clay County, Ashland, Alabama, February 16, 1932, Office Edition, Book 8, page 270; Opinion to Hon. G. H. Howard, Judge of Probate Wetumpka, Alabama, May 6, 1932, Office Edition Book 10, page 21; Opinion to Hon. W. W. Hill, Judge of Probate, Montgomery County, Montgomery, Alabama, September 12, 1935, quoted in Office Edition Book 6-A, page 150-A.

The following opinions of the Attorney General are in conflict with the statement of the law contained in this opinion and insofar as they conflict with the holding here announced, they are expressly overruled: Biennial Report 1928-1930, page 694, opinion to Hon. J. B. Dykes, Chairman, Board of Registrars, Barbour County, Clayton, Alabama; Biennial Report 1926-28, page 337, opinion to Hon. C. F. Winkler, Judge of Probate, Greenville, Alabama.

The following opinion is in conflict with the present opinion in whole or in part, and insofar as it is in conflict with the holding here announced it is hereby withdrawn and corrected to conform to the holding announced in the present opinion: Opinion to Mrs. M. D. Holman, Chairman, Board of Registrars of Sumter County, Livingston, Alabama, under date of December 16, 1935.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 29, 1936.

Hon. M. W. Forman,
Judge of Probate, St. Clair County,
Pell City, Alabama.

Attention Evelyn Pearson, Probate Clerk.

Deed conveying property to religious, educational or charitable institutions is subject to what is known as filing tax.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of January 16, 1936, in which you request my opinion as follows:

> "Will you please advise me whether or not there is a tax due on a deed that conveys property to church owners? It is real estate which is valued at seventy-five dollars. I presume that the Probate Judge receives the customary recording fee for same."

It is true all property used exclusively for educational, religious or charitable purposes is exempted from ad valorem tax **and no other**, under Section 2, page 4, 1935 Revenue Act. But this has no bearing or connection with what is known as filing tax, under Schedule 46, page 253, 1935 Revenue Act, which is in part as follows:

> "Deeds, bills of sale, etc. No deed, bill of sale or other instrument of like character which conveys any real or personal property within this State, or which conveys any interest in any such property, except the transfer of mortgages on real or personal property within this State upon which the mortgage tax has been paid, deeds or instruments executed for nominal consideration for the purpose of perfecting the title to real estate, and deeds and other instruments or conveyances, executed prior to October 1, 1923, shall not be received for record unless the following privilege or license tax shall have been paid upon such instrument before the same is offered for record to-wit: * * *"

And the same is true of Section 94, page 277 of the Act above referred to. The Schedule reads in part as follows:

> "No mortgage, deed of trust, contract or conditional sale, or other instrument of like character which is given to secure the payment of any debt, which conveys any real or personal property situated within this State, or any interest therein, shall be received for record unless the following privilege or license taxes shall have been paid upon such instrument before the same shall be offered for record to-wit: * * *."

I am of the opinion that deeds, mortgages, etc. which convey property to educational, religious or charitable institutions even though it is to be used exclusively for such purposes are subject to the filing tax under Schedule 46 and Section 94, supra. It is true that this office in an opinion to Hon. B. L. Malone, Judge of Probate Morgan County. Biennial Report of Attorney General 1932-1934, page 339, held that where a deed made to a City Board of Education conveying lands to be held in trust by the members of the Board to the use of public schools of said City was not subject to this tax, for the reason that the deed is for the benefit of the State Public School and to tax filing such a deed would be in effect the State taxing itself, and this

can never be done unless the Act levying it specifically states that it shall apply either to the State or to such an instrumentality of the State.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 29, 1936.

Hon. Elvin C. McCrary, Chairman,
Board of Registrars, Calhoun County,
Anniston, Alabama.

Registration—

Purged list—Persons whose names are to be purged from poll list held entitled to personal notice served by sheriff when addresses are known; when "whereabouts" is unobtainable, newspaper notice as provided by law held to suffice.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of January 15, 1936 in which you request my opinion as follows:

> "The list of qualified voters in Calhoun County includes the names of a large number of persons who have not voted in this county for several years and who now reside in other counties in the State, also some whose present residence is known. I understand that those known to be non-residents of the State can be removed without notice but a question has arisen among the Board members as to the proper method for removing those described above. Will you kindly give me your opinion on this matter?"

In reply, to your request, I wish to advise that, in my opinion, under the facts stated in your letter, those persons whose names are to be stricken from the poll list are entitled to service of personal notice by the sheriff when their present addresses are known. In those cases where the person's "whereabouts" is unobtainable and personal service by the sheriff is impossible, a newspaper notice as required by law in my judgment is sufficient. I refer you to an opinion of the Attorney General rendered to the Judge of Probate, Clanton, Chilton County, Alabama, February 7th, 1930 reported in the Biennial Reports of the Attorney General 1928-1930, page 759. See, also, Section 393, Code of 1923, as amended by the Acts of 1927, page 276.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 29, 1936.

Hon. Winston Stewart,
Judge of Probate, Coosa County,
Rockford, Alabama.

Soldier not serving during war not entitled to exemption of Act approved September 13, 1935.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of December 12, 1935, in which you request my opinion as follows:

"I should like to know if the enclosed certificate exempts the party named therein from the operation of the recently enacted Revenue Law for the State of Alabama, in his line of business.

"I will thank you to advise me relative to this matter at your earliest leisure and return the certificate to me in the envelope enclosed for that purpose."

I assume that the applicant is requesting exemption under the Veterans License Exemption Act (formerly 1931 Acts of the Legislature at page 397; now Act by Mooneyham, approved September 15, 1935). As this Act exempts only "disabled veterans of the World War and of the Spanish-American War and of the Civil War," the applicant would not be entitled to exemption under its provisions, as his discharge shows his first service did not begin until "8-6-25".

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 29, 1936.

Hon. J. Percy Oliver,
Judge of Probate, Tallapoosa County,
Dadeville, Alabama.

Rights of way may be paid for from the Road and Bridge Fund or from Gasoline Fund.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of December 11, 1935, stating:

"It has been the practice in this, Tallapoosa County, to pay for rights of way for public roads from the General Funds of the County. Would it be legal to make these payments from the Road and Bridge Fund or from the Gasoline Funds?"

Your first inquiry is answered in the affirmative in an opinion to Hon. Marvin Pearce of Winfield, dated July 11, 1935, copy of which I enclose.

I am of the opinion that your second inquiry should also be answered in the affirmative. This Department has ruled in reference to a former gasoline statute that gasoline funds could be used for the purchase of rights of way. (Opinion to Probate Judge J. M. Money, 1930-1932 Biennial Report, 1017), and I am of the opinion that the same rule applies to the present statute.

I refer you to these two opinions for your official guidance.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 30, 1936.

Hon. Gaston Scott, President,
State Highway Commission,
Montgomery, Alabama.

State Highway Department does not have authority to condemn a right of way for an overpass which is not on a State Road.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of January 8, 1936, stating:

"In the City of Mobile, the Highway Department wishes to construct an overpass over a dangerous crossing, the overpass is not on a State Road.

"The 1925 session of the Alabama Legislature under H-38 by Harrison gave the Department the privilege of matching funds with the Federal Government for construction purposes.

"I am herewith inclosing an Act of Congress which authorizes under Section 8, the construction of grade crossing eliminations. Please return this Act.

"This overpass is to be built with money allocated by the Federal Government.

"The City of Mobile does not desire to condemn the required right of way and wishes the Highway Department to have necessary right of way condemned for the construction of said overpass which at present is not on a State Road.

"Please advise if the State (Highway Department) has the right to condemn the said right of way with the permission of the City of Mobile for carrying out the purpose of the Act of Congress and eliminating a very hazardous grade crossing."

Replying to your inquiry, I am of the opinion that the State Highway Department does not have authority to condemn a right of way for an overpass which is not on a State Road.

The latest expression as to the authority of the State Highway Department is contained in House Bill 646 of the 1935 Legislature, approved September 6, 1935. This Act provides in part as follows:

"It shall be the duty of the department to designate the roads to be constructed, repaired and maintained and to construct, standardize, repair and maintain roads and bridges of this State; and shall have authority to make contracts or agreements to construct, or pave the roadway **only** of the street or streets, which will serve to connect the State Highway constructed or repaired by the State Highway Department, within any town, or municipality of the State of Alabama * * *."

This Act also provides that the State Highway Commission:

"May also cooperate or contract with any municipality or county in the paving or improving of any street or streets, highway or highways, walkway or walkways upon which a State educational or eleomosynary institution or the property thereof may front or abut, * * *."

By making these definite provisions, it is apparently the intention of the Legislature that the authority of the Highway Department be limited to State designated roads and to certain streets definitely indicated in the Acts of the Legislature.

In the case of **Denson v. Alabama Polytechnic Institute**, 220 Ala. 433, 126 So. 133, the Court when considering the right of the Alabama Polytechnic Institute to condemn property, made the following statements:

> "The grant of the power of eminent domain is one of the attributes of sovereignty, and does not pass by implication 10 R. C. L. p. 196. Statutes conferring the right must be strictly construed. New & Old Decatur Belt, etc., R. R. Co. v. Kercher, 112 Ala. 676, 21 So. 825; S. S. S. & I. Co. v. O'Rear, 200 Ala. 291, 76 So. 57. Under this rule the language of Section 522 of the 'School Code of 1927' is of too broad a character to be construed as granting this specific power. Under like reasoning the provisions of section 7476, Code of 1923, must be interpreted as relating to the mode of procedure and not the grant of the power. S. S. S. & I. Co. v. O'Rear, supra. The language of this section discloses that the lawmaking body clearly assumed as previously existing, the power of eminent domain in the Alabama Polytechnic Institute, but under the above rule of construction cannot be construed as a grant of such power.
>
> * * * * *
>
> "We think section 7476 of the Code of 1923 discloses a legislative recognition of this power of eminent domain as existing in petitioner and makes provision for its proper enforcement. The power comes from its inseparable connection with the state of which it forms a part. The power is therefore derived from the sovereign state and needs no express statutory declaration to that end."

I believe that while the State Highway Department forms a part of the State, that nevertheless the Legislature in creating the department has given it no authority over streets which are not a part of the State Highway System, and nowhere has it made provision for condemnation by the State Highway Department of a street under the facts set forth in your letter. On the contrary, the Legislature by implication has limited the auhority of the Highway Deparment in this respect.

House Bill 88 by Harrison, the 1935 Session of the Alabama Legislature, was passed prior to the Act quoted supra, and the Act quoted supra would therefore be the controlling Act. However, I do not believe that House Bill 88, even if it were the latest expression of the legislature, would give the Highway Department authority in the instant case.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 31, 1936.

Hon. Eugene B. Henry,
Commissioner of Licenses,
Jefferson County,
117 Court House,
Birmingham, Alabama.

1. Trustee Loan and Discount Company is a "Financial Institution" under Section 346.1 of the Revenue Act of 1935, and should pay an excise tax under said section.

2. Municipality or county has no authority to increase the license heretofore legally levied on such "Financial Institution" which has properly filed an excise tax return and paid the excise tax provided by the Revenue Act of 1935.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of January 18, 1936, in which you state:

"Trustee Loan and Discount Company, a corporation, does business in the cities of Birmingham, Montgomery and Mobile. It is engaged in the business of making loans, chiefly to wage earners, whose notes are endorsed and the loans re-payable monthly.

"It has heretofore paid an excise tax which is imposed on financial institutions. It proposes to pay this year the excise tax levied under Section 346.1 of the Revenue Act of 1935. This section defines a financial institution as follows:

" '(a) "Financial institution" shall mean and include any person, firm, corporation and any legal entity whatever doing business in this State as a national bank, association, bank, banking association, trust company, industrial or other local company.' "

You request my opinion:

1. Whether or not the Trustee Loan and Discount Company is due to pay an excise tax under Section 346.1 of the 1935 Revenue Act?

2. Whether or not a municipality or county can increase its license tax heretofore legally levied on such a financial institution, which has properly filed an excise tax return and paid the excise tax provided by the Revenue Act of 1935?

In answering your first question, it is my opinion that the Trustee Loan and Discount Company is a "Financial Institution" under Section 346.1 of the Revenue Act of 1935, and should pay an excise tax under said section.

I call your attention to a part of Section 346.1 of the 1935 Revenue Act, which is as follows:

"(a) 'Financial Instituiton' shall mean and include any person, firm, corporation, and any legal entity whatever doing business in this State as a national banking association, bank, banking association, trust company, **industrial or other loan company,** building and loan association, and shall likewise include any other institution or person employing moneyed capital coming into competition with the business of national banks, and shall apply to such person or institution regardless of what business form and whether or not incorporated, whether of issue or not, and by whatsoever authority existing. * * * "

From the facts as stated in your letter, in my opinion the Trustee Loan and Discount Company is an Industrial Loan Company.

In answering your second question, it is my opinion that a municipality or county cannot increase its license tax heretofore legally levied on such a financial institution, which has properly filed an excise tax return, and paid the excise tax provided by the Revenue Act of 1935.

I call your attention to parts of Sections 346.3 and 346.5 of the 1935 Revenue Act, which are as follows:

"SECTION 346.3. (a) Levy and Review. Every such financial institution shall pay to the State annually for each taxable year an excise tax for the privilege of engaging in this State in the business of banking and of conducting a financial institution, as in this article defined, and of conductng a business employing moneyed capital coming into competition with the business of national banks measured by its net income for such taxable year at the rate of six per cent (6%) of such net income. * * *."

"SECTION 346.5. * * * No municipality or county within the State shall have the right to levy or assess any such excise tax for the privilege of engaging in such business in addition to that hereby levied and to be distributed to it as herein provided, except license taxes not in excess of those heretofore legally levied and in effect."

In my opinion the sections, supra, expressly set the maximum amount of the excise tax which may be levied and also expressly prohibit the municipalities or counties from levying additional excise taxes and from levying license taxes except said taxes which are not in excess of those heretofore levied and in effect.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 31, 1936.

Mobile County Board of Registrars,
Mobile, Alabama.

Attention Mr. Sidney J. Gray.

Registration—Voting—Persons in the United States' army or naval service held not precluded from acquiring citizenship for the purposes of registering and voting in Alabama.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of January 21, 1936 requesting my opinion as follows:

"We have an applicant for registration who is enlisted in the United States Coast Guard and has been stationed at Mobile for about ten years. At the time of his enlistment he was a resident of North Carolina. Please advise whether or not he is entitled to register and vote in this State."

In reply, I wish to advise you that in my judgment, the answer to your question must be conditional. Questions of citizenship, registration, and voting present separate questions greatly affected by the individual set of circumstances in the case.

Section 366 of the Code of 1923 provides as follows:

"Residence not acquired or lost by temporary absence.—No person shall lose or acquire a residence either by temporary absence from his or her place of residence wihtout the intention of remaining, or by being

a student of an institution of learning, or by navigating any of the waters of this state, the United States or the high seas, without having acquired any other lawful residence, or by being absent from his or her place of residence in the civil or military service of the state, or the United States; **neither shall any soldier, sailor, or marine, in the military or naval service of the United States, acquire a residence by being stationed in this state."**

In my opinion, the answer to your question must turn upon the construction of the last sentence of the above quoted section. I particularly call your attention to the last phrase of this section, viz: the words "by being stationed in this state." In my judgment, this phrase does not violate the provisions of Section 178 and 180 of the Constitution of Alabama which provide who shall have the right to register and to vote in this state.

The questions of registering and voting depend for answers upon the facts involved in individual cases. I refer you to the case of Lucky v. Roberts, 211 Ala. 578 and authorities cited therein. The law requires two years' residence in the state and one year in the county next preceding the next general election. For the purposes of registering and voting, I refer you to Section 178 of the Constitution and Sections 361 and 381 of the Code of 1923. Also, see Shepherd v. Saratain, 64 So. 57 and authorities cited therein.

The question of legal residence must necessarily depend to a great extent upon the intention of the person claiming such residence. I therefore, refer you to the case of Pope v. Howle, Allen v. Cooper, 149 So. 222 in which the court said:

"(7, 8) The effect of these cases may be thus stated: When the fact of the legal residence of a citizen is once established, such fact of residence is presumed to continue, and this presumption prevails until it is established by the evidence that he has elected to or has established a residence at or in another place. It may further be stated that, while the determination of the place of legal residence of a citizen presents a question of fact, yet in determining that fact, the intention of the citizen is entitled to and must be given due consideration in connection with his relevant acts. It is this combined result of intention and acts—speaking for the voter of his actual domicile, official residence as a citizen and as an elector seeking to cast his vote—that determines the right to vote in such precinct."

Also, see case of Curry v. Barnes 76 So. 22, 200 Ala. 256 and authorities cited therein.

You will note that the Supreme Court in the case of Pope v. Howle, etc. et al, supra said:

"It is this combined result of intention and acts—speaking for the voter of his actual domicile, official residence as a citizen and as an elector seeking to cast his vote."

In my judgment, if the applicant for registration offers sufficient proof of his intention to become a citizen of Alabama coupled with overt acts tending to confirm that intention, and will have at the date of the next general election the legal requirements of residence outlined, supra, he should be permitted to register. In short, it is my opinion that the last sentence of Section 366, Code of 1923, supra, is intended to be a prohibition

against acquiring citizenship by the mere fact that one is in the army, naval or marine service and stationed in Alabama. It is not, in my judgment, a legislative intent that this statute should set requirements contrary to the provisions of the Constituion for registering and voting. It must, therefore, follow that the above quoted statute should not be construed to mean that because one is in the military or naval service of the United States, such circumstance automatically precludes him from acquiring necessary citizenship and residence for registering and voting in Alabama. I wish to refer you to opinions of the Attorney General rendered to Hon. C. D. Rutherford, Chairman, Board of Registrars, Russell County, Hatchechubbee, Alabama, and also to Hon. J. M. Holland, Chairman, Board of Registrars, Winston County, Haleyville, Alabama and Hon. Chas. E. McCall, State Auditor, State Capitol, under date of January 29, 1936, copies of which are enclosed for your convenience.

Search does not reveal any cases in Alabama directly construing Section 366, Code of 1923, supra, but in the case of Holmes, et al v. Pino, et al, 60 So. 78, the Supreme Court of Louisiana construes a section of the Louisiana Constitution which is practically identical with the said Section 366, supra, with regard to undergraduates of college acquiring citizenship in that state. In my judgment, the reasoning as set out in this case is sound. I, therefore, wish to refer you to the same.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 31, 1936.

Hon. Charles W. Lee,
State Comptroller,
Capitol.

Where a warrant is issued by the Governor for the purpose of bringing a fugitive from another state to this state for the trial of a felony and states the name of the party commissioned and "guard", this is sufficient to authorize the state to pay the expenses of the guard who accompanied the agent, without his name being given.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of October 3, 1935 in which you request my opinion as follows:

"Sam P. Burnes, Sheriff of Talladega County, had requisition papers issued for Robert C. Crews and one for Nolan Lakey and Henry Hollinsworth, and acting upon such requisition papers he went to Texas for the former and Pensacola, Florida, for the latter two, and has duly filed his claim for the expenses of returning these prisoners to Alabama including the cost of a guard.

"The requisition papers in the first case are directed to 'J. B. Bryant and guard', and the papers in the latter case are directed to 'Sam Burns and guard'.

"J. J. Bryant is Deputy Sheriff of Talladega County, and the bill for expenses is filed in his name in the case where the requisition pa-

pers were directed to him and guard. The name of the guard is not inincluded in either of the requisition papers, but in the return of Sheriff Burns and J. J. Bryant and in all other papers the name of the guard who actually responded to the order contained in the requisition was properly given.

"Please advise me officially if I am authorized to pay the amount of the legal expenses incurred in the return of the prisoners in these cases, notwithstanding their names are not mentioned in the original requisition papers signed by the Governor."

It is my opinion the extradition warrant in the first case was sufficient to authorize the Deputy Sheriff, J. B. Bryant, to carry with him a guard and having carried a guard to receive the per diem and expenses of such guard as provided by the statute. The executive warrant says: "J. B. Bryant and guard". The Commission is to Bryant, the Deputy Sheriff, and not to the guard. Likewise, in the second case, it is directed to Sam Burns and guard. Here again the commission is to Burns with the permission to carry a guard. The guard is not commissioned, but the party named in the petition for extradition is commissioned, and the governor may or may not allow a guard. Therefore, I think where the Governor's warrant says "..... and guard", the party so commissioned can carry any person he may choose as a guard and be paid as the statute provides. However, I think in making out his expense account to the State, if he claims for the guard, the name of the person who acted in this capacity should be shown. If the Governor should name the guard in his warrant and it should happen that the person so named by the Governor should for any reason be unable to make the trip, on account of sickness, death or other cause, could it be said that before the party designated could go for the absconding felon would be required to make a new application for requisition on account of such guard's inability to make the trip? I think not. Therefore, the opinion of this office written to Hon. J. H. Hard, Jr., State Comptroller on April 11, 1933, Biennial Report of Attorney General 1932-34, page 215 is hereby overruled in so far as said opinion relates to guard which accompany the party commissioned, and this opinion, so far as this particular item is concerned, is substituted in its place.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

January 31, 1936

Hon. Gaston Scott, President,
State Highway Commission,
Montgomery, Alabama.

Drivers License Act—

(1) The Highway Commission may adopt necessary rules and regulations for proper enforcement of driver's license act not contrary to existing law, limited strictly to the scope of the act.

(2) Highway Commission may not adopt violations provided by statute as their rules and regulations, providing different punishment in different court of trial.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of September 17, 1935, stating: "Section 9 of H. B. 545, Drivers License Bill, provides as follows:

"Sec. 9 'The State Highway Commission, with the approval of the Governor, shall establish and promulgate reasonable rules and regulations concerning the operation of motor vehicles upon the highways of this State and concerning the enforcement of the provisions of this Act.'

"Under this section would the Highway Commission have authority to establish or promulgate any rule or regulation in conflict with the traffic regulations as passed by Act of the 1927 and 1932 Legislatures, or would the Highway Commission have authority to add to these regulations as passed by the 1927 and 1932 Legislatures, new rules, etc.?

"If, under Section 9 of House Bill 545, the Highway Commission should adopt the traffic laws now in effect as rules and regulations, and should the Governor approve their action then under paragraph (c) of Section 10, which reads as follows: '(c) Any person who violates any provision of this Act for which no specific punishment is prescribed or who violates any rule or regulation established or promulgated by the State Highway Commission, with the approval of the Governor, as herein authorized, shall be guilty of a misdemeanor and, upon conviction thereof before a Justice of Peace Court or Court of like jurisdiction, may be punishable by a fine of not less than $10.00", and

"Paragraph (e) of Section 10 which reads as follows: '(e). Justices of the Peace or Notaries Public Ex-officio Justices of the Peace in their respective counties shall have jurisdiction to try any person charged with the violation of this Act and shall be authorized to impose the penalties therein provided upon conviction,'

"Would the traffic officers as provided for under this Act have authority to try all traffic violations of the rules and regulations adopted by the State Highway Commission under this Act, before a Justice of the Peace and would a Justice of the Peace have authority to assess and collect a fine under the rules and regulations adopted by the Highway Commission under this Act and approved by the Governor?"

Your Commission, with the Governor's approval, may legally adopt necessary rules and regulations for the proper enforcement of House Bill 545 (Approved September 2, 1935) so long as such rules and regulations are reasonable, are not contrary to existing statutes, and are limited strictly to the scope of the Act.

The general rule in reference to delegating powers is stated in 12 Corpus Juris, 847 (Section 529), as follows:

". . .The rule is now established that the Legislature may authorize an officer to make rules and regulations for the purpose of carrying out the objects of the statute, and may make a violation of these rules a criminal

offense, punishable in a manner prescribed by existing law." Light v. U. S. 220 U. S. 523; U. S. v. Grimaud, 220 U. S. 506.

The Alabama Court of Appeals in the case of **Reims v. State** 17 Ala. Apps. 128, 82 So. 576, sets forth the law in this State in these words:

"That the Legislature may confer, and has conferred, authority on the State Livestock Sanitary Board to make rules and regulations, the violations of which will support prosecutions when the statute denounces the act as a crime, is settled beyond question. Curlee v. State, 16 Ala. Apps. 62, 75 So. 268; Floyd v. State, 15 Ala. Apps. 654, 74 So. 752; Whalen v. State, 168 Ala. 152, 52 So. 941, 30 L. R. A. (N. S.) 449. But all such rules and regulations, in order to be effectual, must conform strictly to the statutes authorizing their enactment."

The distinction, however, between rules which may be thus established and given the effect of law, and those which will be stricken down as the exercise of unlawfully delegated legislative authority, is a close one. See **Ingram v. State,** 39 Ala. 247; **Parke v. Bradley,** 204 Ala. 455 and **Compton v. Alabama Power Co.,** 216 Ala. 558.

The Highway Commission, with the approval of the Governor, may therefore adopt rules and regulations, but such rules and regulations must not be in conflict with existing statutes and must conform strictly to the provisions of House Bill 545.

Replying to your second inquiry, I am of the opinion that the Highway Commission would not have authority to adopt the traffic laws now in effect as rules and regulations. The present traffic laws were enacted by the Legislature. They provide the penalty for their infraction and the court in which alleged violations are to be tried.

To allow the Highway Commission to adopt them, would in effect, allow the Commission, with the approval of the Governor, to change the measure of punishment heretofore prescribed by the Legislature for violation of these laws, and to invest Justices of the Peace and Notaries Public Ex-officio Justices of the Peace with jurisdiction over subject matter not delegated to them by the Legislature. (As to jurisdiction of these officers, see opinion of this office dated April 3, 1935, addressed to Hon. Festus M. Shamblin and other opinions referred to therein.)

This would constitute an altering or repealing of Acts of the Legislature by a Board with delegated powers. It is my opinion, therefore, that to the extent that either of the previous Acts would be thus repealed or altered, the adoption of rules and regulations as described above would not be permitted under the law.

Yours very truly,
A. A. CARMICHAEL,
Attorney General

January 31, 1936

Hon. W. W. Brooks,
Financial Adviser to the Governor,
Capitol.

Opinion by the Attorney General.

Dear Sir:

I have your letter of January, 31, 1936, as follows:

"On November 8, 1934, the State Warrant Commission issued Warrant Refunding bonds in the sum of $280,000.00 and delivered the same to the State Treasurer, taking his receipt for the same on November 14, 1934, stating that bonds were to be delivered to the institutions for the appropriations made for the institutions and to be delivered to the institutions only after requisition had been made by the State Board of Education.

"Bonds so held by the State Treasurer to pay appropriations were $100,000.00 to Alabama School of Trades and Industries, Gadsden, and $180,000.00 to the Daphne Normal School, Daphne, Alabama. The Board of Education has requisitioned $55,000.00 of the bonds held by the State Treasurer, requesting that refunding bonds be sold for the purpose of refunding the $55,000.00 Warrant Refunding bonds.

"Please advise if refunding bonds can be sold for the purpose of refunding the Warrant Refunding Bonds in the sum of $55,000.00, as provided in Act No. 50, page 27, of the Alabama General Laws passed at the regular session of 1935."

You inquire whether the Alabama School of Trades and Industries of Gadsden, Alabama may proceed to sell $55,000.00 of the $100,000.00 Refunding Bonds for the purpose of refunding Warrant Refunding Bonds in a like amount, as provided by Act No. 50 at page 27 of the General Acts of Alabama, Regular Session 1935.

These bonds were issued under and pursuant to the authority conferred by a constitutional amendment voted and adopted by the people of Alabama on July 18, 1933, and proclaimed by the Governor of Alabama as a part of the Constitution of the State of Alabama on August 2, 1933, and said amendment being known now as Article 23 of the Constitution of Alabama; and pursuant also to the provisions of an Act of the Legislature of Alabama approved February 8, 1935, enacted by a Regular Session of the Legislature of Alabama of 1935, the last mentioned Act providing for the refunding of outstanding Warrant Refunding Bonds of the State of Alabama issued theretofore and pursuant to authority contained in Act of the Legislature of Alabama approved April 17, 1933.

I note that the State Warrant Commission issued these $280,000.00 of Warrant Refunding Bonds on November 8, 1934 and these bonds were delivered to the Treasurer of the State of Alabama in compliance with the appropriations made to these Institutions, to be delivered to the said Institutions after requisition had been made by the State Board of Education. I note further that on the 24th day of January, 1936, the State Board of Education placed a requisition with the State Treasurer requesting that the

State Treasurer release $55,000.00 of the appropriation of $100,000.00 made by the Legislature to the Alabama School of Trades and Industries.

I have examined carefully the Constitution and Statutes of this State, and it is my judgement that the entire $280,000.00 of bonds mentioned hereinabove were issued in accordance with the Constitution and Statutes of the State of Alabama, and constitute valid, general obligations of the State of Alabama, for the payment of the principal and interest of which the full faith and credit of the State of Alabama are pledged.

I am of the opinion that the Alabama School of Trades and Industries may proceed to sell the $55,000.00 Refunding Bonds released to this Institution, and that the same were issued in accordance with the Constitution and Statutes of this State and constitute valid, general obligations of this State for the payment of the principal and interest of which the full faith and credit of the State of Alabama are pledged.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 1, 1936

Hon. Frank M. Johnson,
Judge of Probate, Winston County,
Double Springs, Alabama.

Licenses:

Ex-service men exemptions- Operator of saw mill using more than one employee not entitled to exemption given to veterans under Act No. 494, approved September 15, 1935.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of December 5th, in which you state:

"Schedule 123, provided in part as follows: 'Each person, firm or corporation engaged in operation of SAW MILL shall pay a privilige tax according to capacity, as follows: Those having a capacity of 5,000 feet or less per day., $10.00, provided only state license shall be paid by the operator or owner of any saw mill.'

"If 'A' purchases license in one County paying the State and County license paying $15.50 (the total amount for the smallest capacity mill), can he then go into any other county in the state and get a license to operate for $3.50 being the county and Judge's fee?

"An Act No. 494 S. 345— Mooneyham, approved September 13, 1935 Gives an ex-service man, who has 25 per cent disability and exemption of privilige license to the state and county each, $25.00, provided he qualifies otherwise under said bill. Mr. 'B' owns two saw mills in this county, having bought license for one mill, he, being an ex-service man with the proper qualifications for exemptions, can he get the license

for the other mill without the payment of the licenses although he uses more than one employee around the mill?

"Please let us have your opinion on the two questions above at an early date."'

In reply to your first question, I beg to enclose copy of opinion to Hon. Page S. Bunker, State Forrester, which fully answers your question.

In answer to your second question, you state that the ex-service man seeking exemption has more than one employee at the mill. Under the specific terms of the Act, the exemption is limited to persons who perform the labor themselves or with the help of not more than one employee. Under your statement, the exemption is not authorized.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 3, 1936

Hon. Eugene H. Hawkins,
Judge of Probate,
Jefferson County,
Birmingham, Alabama.

Taxation - Redemption - Erroneous payment of Interest.-

1. Upon redemption of property sold to the State subsequent to October 1, 1935 and prior to the opinion of November 22, 1935, interest was charged by the Probate Judge, such interest not being due under the provisions of Section 291 of the Revenue Act of 1935, such interest should be refunded to the redemptioner.

2. Where officer receiving such funds has remitted to the various agencies, refund should be made under the provisions of Section 296 et seq. of the 1935 Revenue Act.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I received your letter some weeks ago in which you stated:

"Under instructions from the State Tax Commission, we collected interest on all past due taxes where redemptions were made in this office for cash, during the month of October and during the month of November, up until the date of receiving your opinion of November 22 in which you held that such interest should not be collected.

"We have already remitted the interest collected during October to the various tax agencies, and we are holding the interest collected during November, for proper distribution. In only one or two instances was this interest paid under protest.

"Please advise whether or not we should make a refund to the taxpayer of interest on hand, and if such refund is proper, please advise

what procedure would be necessary for taxpayers to secure a refund of interest already paid by us to the tax agencies in question. The interest involved amounts to a considerable sum of money, and we will thank you to give this matter your prompt attention."

In reply, I advise that in my opinion such interest as you received prior to the opinion of November 22 and which you did not remit to the various agencies should be refunded by you. As the funds never went into the treasuries, I see no reason why you should not make these refunds as you are required only to report the correct amount.

I have given much thought to the manner of refunds when a remittance has already been made by you to the various state agencies. It is my judgement that the interest which you collected during October and prior to the opinion and which has been remitted should be refunded, but the machinery authorizing such refund is not altogether clear. However, I am of the opinion that the machinery provided by Section 296 et seq. of the Revenue Act of 1935 is sufficient authority for the refund to be made.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 3, 1936

Mrs. Daisy Donovan,
Child Labor Inspector,
Department of Labor,
Montgomery, Alabama.

(1) Drug store not necessarily "public place" under Section 3512.

(2) Question as to whether or not the employment of girls to do "curb service" is illegal is dependent on the facts in each case.

Opinion by Assistant Attorney General Lawson.

Dear Madam:

This is to acknowledge receipt of your letter of November 27, 1935 which is as follows:

"Will you kindly advise this Department if it is lawful for girls under eighteeen years of age to be given employment certificates for the purposes of working at drug stores **doing curb service.** In other words, is not such an occupation prohibitive for girls under Section 3512 Code of Alabama, 1923 which is as follows:

'3512. BOYS UNDER TWELVE AND GIRLS UNDER EIGHTEEN PROHIBITED FROM WORKING IN CERTAIN PUBLIC PLACES. No boy under 12 years of age and no girl under 18 years of age shall, distribute, sell, expose or offer for sale, newspapers, magazines, periodicals, handbills or circulars, or be so employed or permitted or suffered to work in any other trade or occupation performed in any street or public place; but boys 10 years of age or over may engage in the distribution of newspapers and periodicals on fixed routes in the

resident districts of towns or cities; and boys 12 years of age or over may engage in the occupation of bootblacks.'

"Is a drug store a public place?"

I am familiar with the opinion rendered on June 10, 1929, a copy of which was attached to your letter, wherein it was held that no girl under eighteen years of age is permitted to work in a public place.

In my judgement, this opinion, if strictly construed, would prevent the employment of girls under eighteen years of age in stores, offices or other similar places of business because, in a sense, they are all public places under some definitions of that phrase. The phrase "public place" is relative and not absolute, and what is a public place for one purpose may not be for another. The nature, location and use of a particular place are to be considered as is also the intent of the statute.

From a consideration of the statutes dealing with Child Labor Laws I do not think it was the intention of the Legislature to prevent a girl under the age of eighteen years from working in any store, office or like business. I think that the words "public place" as used in Section 3512, are to be limited to such places as are similar to streets. I do not think that a drug store is such a public place as was contemplated by said Section 3512.

In the case of Madison Products Co., Inc., et al. v. Coler, Commissioner of Public Welfare, 152, N. E. 264, a statute similar to said Section 3512 was construed. The statute was as follows:

"No person, organization, society, association, or corporation shall solicit money, donations or financial assistance of any kind, upon the **streets or in public places** in the city of New York, except upon a license issued by the commissioner of public welfare and under such regulations as is hereinafter provided."

It was charged that the Appellant, the Madison Products Company, was engaged in soliciting money, donations or financial assistance from shops, stores, offices, factories, and the like without obtaining a permit as is required by the above quoted section. They defended on the ground that such places were not streets or other public places as those words were used in the statute. The Court held:

"We think that the words just quoted 'or other public places' may be read in connection with the words immediately preceding them, and which name public places, rather than in connection with the more remote words 'factories, shops, offices,' and that therefore this provision does not have the effect in defining public places which is claimed for it. And so, as it seems to me, we come in the last analysis to the question whether it can be said that a home, private office, or factory is a public place within the meaning of the ordinance. The words 'public place' used in the ordinance must be interpreted in the light of their association with the connecting word 'streets,' and thus interpreted we do not think that it was intended to mean or include homes, private offices and factories. The meaning of the words 'streets' and 'public' places' naturally suggest those places in a city which are open to the general public and upon the use of which by the general public there is no limitation except that which may be required in the interest of safety

and good order. We can take judicial notice that this is not the character of a home, private office or factory. These are under private control, and are not open to the unrestricted entrance and use of the public. No one comes there except by the permission of the owner or proprietor, and if he desires to close the door against all comers at any time, he is at liberty to do so. These are not the characteristics of 'streets or public places', and I do not think such places are within the contemplation of the ordinance."

I do not agree with the opinion of June 10, 1929, heretofore referred to, in so far as it declares that no girl under eighteen years of age is permitted to work in a public place without defining or giving any intimation as to what is meant by public place. I do not think a barbecue stand or hot dog stand or drug store is necessarily such a public place as was contemplated by the statute.

The question as to whether or not girls under eighteen years of age are entitled to employment certificates for the purpose of working in drug stores doing curb service would, in my judgement, depend entirely upon the facts in each case. If a girl is employed solely to remain on the sidewalk and to attend on cars which stop in the street in front of the place of business, then, in that event, I think the girl would be doing work in a street and would come within the operation of Section 3512. However, if doing curb service work is merely incidental to her job in the drug store, I do not think it would come within the statute.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 3, 1936

Hon. T. C. Almon,
Attorney for City of Decatur,
Decatur, Alabama.

Municipal Corporations-- Municipalities are not included under the provisions of Act No. 447, Senate Bill 395, approved September 14, 1935, known as the "Unemployment Compensation Law."

Opinion by Assistant Attorney General Screws.

Dear Sir:

This is to acknowledge receipt of your letter of January 10, 1936, in which you request my opinion as to whether or not municipalities are included under the provisions of Act No. 447, Senate Bill 395, approved September 14, 1935, known as the "Unemployment Compensation Law."

I am of the opinion that your inquiry should be answered in the negative.

Subsection (g) of Section 2 specifically provides in part as follows:

"The term 'employment' shall not apply to * * * (6) Service performed in the employ of a state, or political subdivision thereof, or an instrumentality of one or more states or political subdivisions; * * *.

It will be noted from the above that the exemption is broad and far reaching. It includes not only a political subdivision of a state but also an instrumentality of one or more states or political subdivisions.

The courts of this State have laid down the following definitions concerning municipal corporations:

" 'Municipal corporations' are mere instrumentalities of the state for the more convenient administration of local government, and their powers are such as the Legislature may confer, and which may be enlarged or withdrawn at its pleasure." **State v. Gullatt,** 210 Ala. 452, 98 So. 373.

"A 'town' or 'city' is a voluntary association created and built upon voluntary assent of community and its citizens, and enjoys priviliges and rights given in its charter of creation and laws governing same." **Montgomery v. City of Athens,** 229 Ala. 149, 155 So. 551.

"A 'municipal corporation' is an instrumentality of the State and possesses such powers as the Legislature confers upon it." **Carey v. City of Haleyville** (Alabama Supreme Court) 161 So. 496.

In Florida it was held that a "municipality" in its purely governmental relations is a subordinate political subdivision of the state for local government purposes. -- **West v. Town of Lake Placid,** 97 Fla. 127, 120 So. 361. See also **Loeb v. City of Jacksonville,** 101 Fla. 429, 134 So. 205.

Although our Supreme Court has not directly held that a municipal corporation is a political subdivision of the State, yet it has affirmatively held that it is an **instrumentality** thereof. Since an instrumentality is included in the exemption above set out, it follows that a municipality, being an instrumentality of the State, comes within the exemption. Therefore a municipality would not come under the provisions of the "Unemployment Compensation Law", supra.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 4, 1936

Hon. J. P. Farish,
Sheriff of Monroe County,
Monroeville, Alabama.

1. If a defendant is arrested and carried before a magistrate on a felony charge, and after preliminary hearing the defendant is bound over to await the action of the Grand Jury, and his bail is fixed by the magistrate, this would carry the case directly into the Circuit Court without rearrest.

2. If the defendant is charged with a capital offense in the indictment even though the magistrate on the preliminary hearing had granted him bond, the court would naturally, after it read the indictment, order his rearrest and confinement in the county jail.

3. Defendants in all cases charged with felonies, which are not capital, and which have been heard before a magistrate and bound over

on bond to appear at the Circuit Court and answer whatever indictment that may be found against such defendants, do not have to be rearrested but must appear in the Circuit Court on the day the trial is set and failing to appear, their bonds should be forfeited.

4. In capital cases, whether or not the defendant be in jail or on bond, he must be brought into court, and his case set down specially for trial and he must be present at the drawing of the special venire for said cause

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of November 16, 1935, in which you request my opinion as follows:

"The following question has arisen here, upon which we request your opinion.

"Section 3741 of the Code provides for certain fees for the sheriff for executing warrant or writ of arrest in misdemeanor and felony cases. Section 3278 provides for the issuance of writs of arrest by the Circuit Clerk forthwith after the finding of indictment by the Grand Jury.

"A defendant is arrested on a criminal charge and after preliminary hearing, is placed under bond to await the action of the Grand Jury. When the indictment is returned against this defendant, he is not present to surrender.

"The Court does not forfeit the bond but instructs the Sheriff to go out and get the defendant so that his case can be set for trial. The sheriff then makes another arrest under this capias or order of the Court. Is he not entitled under this state of facts, to another arrest fee, even though the defendant was under bond to await the action of the Grand Jury?"

If the defendant is charged with an offense, that is a felony and such an offense is bailable and the magistrate trying him on a preliminary hearing under Section 5238, Code of Alabama, 1923, binds him over to await the action of the Grand Jury and fixes his bond requiring him to appear at the Circuit Court or a court of like jurisdiction and answer whatever indictment or charge that may be found against him, and the Grand Jury indicts him for the offense charged, there can be no use for rearrest after the indictment --Ex parte Skelton, 104 Ala. 98. This bond guarantees his appearance to answer the indictment unless the Judge, in his discretion, under Section 3364 Code of Alabama, 1923, and Section 3278 Code of Alabama, 1923 as amended in an Act approved July 23, 1931, General Acts 1931, p. 652, sees fit to increase the bond or hold the defendant without bond; in this event it becomes the duty of the sheriff to rearrest the defendant and require a new bond in accordance with the order of the presiding Judge, (endorsed on the indictment), then it is my opinion the sheriff would be entitled to fee for both arrests.

If the preliminary hearing is for an offense which may not be bailable, depending on the evidence, and the magistrate holds, under the testimony the case made out presents one that is bailable and grants bond to await the finding of the Grand Jury, and the Grand Jury returns an indictment

charging an offense which is not bailable, in this event, the Judge would so endorse on the indictment, then capias would issue, defendant would be rearrested and placed in jail. Then the sheriff would be entitled to two arrests provided he made the arrests in the original case which was before the magistrate. --State vs. Lowe, 204 Ala. 288 (85 So. 707)

If the defendant is under bond to await the action of the Grand Jury, and the Grand Jury indicts him for the offense originally charged on the preliminary hearing, he does not have to appear until his case is set down for trial, except where he is charged with an offense that may be punished capitally. In this event, he must appear even though he is under bond, if the indictment charges a capital offense, and have his case set down for trial and be present at the drawing of a special venire for same.

In all other cases the defendant must appear on the day his case is set for trial and if he fails to appear, on said date, and his case is called for trial, it is the duty of the Court to forfeit his bond and order an alias capias for his arrest and continue the cause.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 5, 1936.

Hon. Q. D. Taylor,
Sheriff, Marshall County,
Guntersville, Alabama.

1. Guard authorized, where tubercular prisoner is removed to unguarded hospital quarters under order of Circuit Judge.

2. Sheriff - Liability for injury to tubercular prisoner where removed to unguarded hospital quarters, dependent on attendant circumstances.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of December 18, 1935 in which you request my opinion as follows:

"One Tom Haney was a prisoner in my jail. The doctors who examined him here all say he has active tuberculosis. He has hemorrhages of some kind or character, spits up blood. He has epileptic seizures and was gassed during the World War. He draws $50.00 per month from the government on an arrested case of tuberculosis.

"He is in jail without bail for murder in the first degree.I have no way of segregating him from the other prisoners at this time. It is impossible for me to keep them and him in this jail and keep him segregated without two additional guards, one to be with him in the daytime and one at night in the hospital portion which is not barred so as to hold the prisoners.

"He has been transferred by an order of the Circuit Judge to the Tuberculosis Hospital at Wetumpka. I have been ordered by Mr. Draper to remove him back, as I wired you today. In case he is removed back to this jail, what shall I do with him? The financial condition of the

County is such that the Board of Revenue has seen fit not to make any appropriation under the General Budget for such purposes as these guards. They decline to pay them. Would I be subject to damages or prosecution if I place him in the cell with the others? If he is placed in this hospital portion which is not barred and he should escape, would I be responsible without a guard? If he is placed in that portion and should happen to have one of these epileptic seizures, which come on suddenly, fall out of a window and break his neck or be injured, would I be responsible?

"If the Circuit Court should order him placed in this hospital department and order me to hire, at the expense of this County, two guards, one to be with him at all times in the day-time, the other at all times at night, would the Board of Revenue have to pay for these guards?"

In my opinion, an answer to the question, "In case the prisoner, Tom Haney, is removed back to the jail, what shall I do with him?" should dispense with the necessity of reply to your other inquiries.

In this regard, I call your attention to section No. 4811 Code of Alabama 1923, which provides for the removal of prisoners in ill health to some suitable place, under conditions as follows:

"4811. Removal of prisoners in ill health. -- When the life or health of any prisoner, who is not confined under process from any court of the United States, may be seriously endangered by longer confinement in jail, and that fact is made to appear clearly to any Circuit Judge, or to the Judge of the County Court of the County, such Judge, must, by an order in writing, direct the sheriff or jailer to remove him to some suitable place, or hospital, as near as may be to the jail, and there safely keep him until his health is sufficiently restored to authorize his recommitment to jail."

Under the authority given by this section, the proper procedure for you to follow should Haney be returned, is to remove said prisoner, under written order from the Circuit Judge, to "some suitable place". In my opinion, the hospital portion of your jail is such a "suitable place" within the above section to which you may properly remove the prisoner.

I further call your attention to section 4812 which provides for the summoning of guards when a prisoner is removed under Section 4811, supra. This section is as follows:

"4912. Same; guards summoned.-- When prisoners are removed from the jail under the provisions of either of the two preceding sections, the sheriff or jailer has authority, and it is his duty, to summon such guards as may be necessary to insure their safekeeping."

I do not find, however, any authority of law that would authorize payment of these guards.

Section 3734 provides that,

"The law of costs must be deemed and held a penal law, and no fee must be taken but in cases expressly provided by law. The fees prescribed in this Code shall be the only fees that can be collected by any officer."

This office in an opinion to Hon. W. A. Quillen, Russellville, Alabama (Biennial Report Attorney General 1930-1932, p. 184), held that the State or County could not properly pay guard fees and expenses incurred in guarding escaped prisoner ill in hospital in a city in Mississippi.

I do not see that there is any material distinction between the case at hand and that treated in the above opinion.

Premises considered, it is your duty to receive the prisoner, when returned and, upon written order of judge place him in some "suitable place", such as the hospital division of your jail, or some other hospital "as near as may be to the jail", and summon such guards "as may be necessary to insure (his) safekeeping."

In answering the questions propounded by you as to your liability in the event of injury to Haney, or his escape if not properly guarded, will say that the sheriff, both by common law and by statute has been held to owe the direct duty to a prisoner in his custody to keep him free from harm and for any breach of such duty resulting in injury, he is liable to the prisoner. Whether due or ordinary care has been exercised in safekeeping and attending a prisoner such as the one now under discussion is a question of fact to be determined in the light of all the facts and circumstances. 57 C. J. 899 (Sec. 512).

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 7, 1936

Mrs. Gertrude P. Calloway,
Treasurer, Chilton County,
Clanton, Alabama.

Statutes - Court of County Commissioners - Transfer of funds Chilton County.

1. Act No. 139, H. B. 375 approved June 15, 1935 (General Acts 1935) is constitutional.

2. (a) Duty of the County Treasurer to determine if there are sufficient funds in General Fund to justify transfer under facts stated.

(b and c) County Treasurer should comply with Section 231 of Code and also consider other claims of the same class which have priority before making transfer of money from General Fund to Fine and forfeiture Fund.

3. If the Court of County Commissioners of Chilton County at some future time adopts a budget for Chilton County said action can have no effect on existing valid orders of said Court.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I acknowledge receipt of your letter of January 2, 1936 in which you state:

"1st. On July 9th, 1935 you rendered an opinion to me holding that House Bill 375 by Cox (Local Act No. 139) was properly enacted and is a

valid provision, but upon the assumption that the same was duly advertised and properly passed. Is it consistent to ask your opinion on this bill without such qualification.

"2nd. The Commissioners Court of Chilton County, according to information which I have, on December 2nd, adopted a resolution transferring $10,000.00 from the General Fund of Chilton County to the Road and Bridge Fund of Chilton County and on December 21st adopted a resolution transferring $5,000.00 from the General Fund of Chilton County to the Fine and Forfeiture Fund of Chilton County.

"If it be assumed that said Court had the authority to adopt such resolutions (a) whose duty is it to determine whether or not there is sufficient Funds in the General Fund of Chilton County to justify my making such transfer, and (b) if it is my duty to determine such fact then I would like to know whether it is my duty to make such transfer in the event I determine that there is a sufficient amount in the General Fund to make such transfer and to pay all preferred claims set forth in Section 231 of the Code which may accrue before October 1, 1936. (c) If it is my duty to take into consideration any other items in determining whether or not to make such transfer please advise me as to what else I must consider.

"3rd. If, after the Court adopted the resolutions above set forth making said transfer, it adopted a budget for Chilton County for the remainder of the year ending October 1, 1936, did such action have any bearing upon said orders of transfer already made?

In reply to your first question, I have examined said Act, the House and Senate Journals, and it is my opinion that Act No. 139, H. B. 375, approved June 15, 1935 (General Acts 1935) was legally and properly passed and is constitutional.

In answering part (a) of your second question, in my opinion it is the duty of the Treasurer of Chilton County to determine whether or not there are sufficient funds in the General Fund of Chilton County to justify the transfer as outlined in your letter.

I call your attention to a part of Section 231 of the 1923 Code of Alabama which is as follows:

"**For the payment of the above recited claims, in the order named, it shall be the duty of the county treasurer or custodian of the county funds to set apart a sufficient fund from the moneys of the county and he and his official bond shall be held liable for a failure so to do, in so far as the funds of the county make it possible for him so to do."

In the case of Allen v. Watts, 88 Ala. 497, 7 So. 190, the Court said:

"It is made the duty of the county treasurer to set apart, from the moneys of the county in his hands, a sum sufficient to pay the preferred claims, which constitute the necessary current expenses of the county; the moneys so set apart by him cannot be subjected to the payment of other claims, nor even of similar claims already incurred and accrued; and if he sets apart a greater sum than is necessary for the prescribed purpose, the holder of another claim can only have judgement for the surplus, or excess."

In answering parts (b) and (c) of your second question, in my opinion the county treasurer should also consider claims which had been allowed by the Commissioner's Court of Chilton County prior to the date of the order directing such transfer as the transfer of funds from the General Fund to the Fine and Forfeiture Fund, as provided for by the Local Act, should not be made until the Treasurer has complied with Section 231 of the 1923 Code of Alabama, and is satisfied that there is enough money in the General Fund to care for any allowed claims of the same class which have priority.

After the conditions as enumerated above have been fulfilled, then, in my opinion, it is the duty of the County Treasurer to transfer the money from the General Fund to the Fine and Forfeiture Fund.

In my opinion your third question should be answered in the negative. I have been informed that up to the present time the Court of County Commissioners has never adopted a budget for Chilton County, therefore, a budget adopted at some future time would have no effect on the existing valid order of the Court. It being presumed that in making up a budget in the future, the fact of said previous order and transfer will be taken into consideration.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 7,1936

Hon. J. Lee Smith,
Judge of Probate, Chilton County,
Clanton, Alabama.

Statutes - Court of County Commissioners - Transfer of funds Chilton County -

1. Act No. 139, H. B. 375, approved June 15, 1935 (General Acts 1935) authorizing the transfer of $5,000 from General Fund of Chilton County to Fine and Forfeiture Fund held valid enactment.

2. Where there is not enough money in the general fund of the county to pay all preferred claims as set out in Section 231 of the Code of 1923 and the claims that had been allowed by the Court of County Commissioners prior to the date of the order transferring $5,000 from the general fund to the Fine and Forfeiture Fund, such transfer should not be made. If there are sufficient funds to pay such claims, the transfer is authorized.

3. It is the duty of the County Treasurer to determine the amount necessary to provide for the payment of such claims.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of January 1, 1936, in which you state:

"There is herewith enclosed a copy of a local act passed by the Lesislature at its regular session in 1935.

"The Court of County Commissioners on the 21st day of December, 1935, passed an order directing the Treasurer of Chilton County to transfer $5,000 from the General Fund of the County to the Fine and Forfeiture Fund, acting under the authority of said Act. The General Fund had approximately $34,000 to its credit on December 1, 1935, and to my best information and belief, after this amount of $5,000 is transferred there will not be sufficient funds in the General Fund, along with the additional receipts of this fund, to pay the general running expenses of the County and to pay all other claims and expenses of the County properly payable out of this Fund until October 1, 1936.

"Will you, therefore, please advise me whether or not the Local Act set forth is constitutional and whether the same was legally and properly passed by the Legislature?

"Will you also advise me whether, in view of the circumstances and conditions set forth in this letter, that said sum of $5,000.00 can be legally and properly transferred from the General Fund to the Fine and Forfeiture Fund?"

In reply to your first question, I have examined said Act, the House and Senate Journals, and it is my opinion that Act No. 139, H. B. 375, approved June 15, 1935 (General Acts 1935) was legally and properly passed and is constitutional.

I enclose a copy of an opinion of this office rendered on July 9, 1935, to Mrs. Gertrude P. Calloway, Treasurer of Chilton County, Alabama.

In answering your second question, it is my opinion that if there is not enough money in the General Fund of the County to pay all preferred claims as set out in Section 231 of the Code of 1923, and the claims that had been allowed by the Court of County Commissioners prior to the date of the order directing such transfer then the transfer of $5,000.00, as outlined in your letter should not be made. In my opinion it is the duty of the County Treasurer to determine the amount of funds necessary to provide for the payment of the preferred claims as enumerated in Section 231 of the 1923 Code of Alabama. A part of said section provides as follows:

"For the payment of the above recited claims in the order named, it shall be the duty of the county treasurer or custodian of the county funds to set apart a sufficient fund from the moneys of the county and he and his official bond shall be held liable for a failure so to do, insofar as the Funds of the county make it possible for him so to do."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 7, 1936.

Mrs. Marie B. Owen, Secretary,
Alabama Memorial Commission,
Montgomery, Alabama.

Deductibility of contributions determined by proper rules and regulations of State Tax Commission.

Opinion by Assistant Attorney General Knabe.

Dear Madam:

I have your letter of December 5, 1935, requesting my opinion as follows:

"You have noticed in the Advertiser of Monday, December 2, possibly, where the American Legion is sponsoring a campaign to secure funds for the erection of a Memorial Building which is to house the collections of the Alabama State Department of Archives and History. The Building will also serve as State headquarters for the Legion and other military and patriotic organizations.

"The Memorial Commission is now planning ways and means by which a half million dollars may be raised in Alabama. The question has arisen as to whether gifts to a State buildings or a World War Memorial are deductible from the State Income Tax of an individual.

"I hand you herewith a letter written to me in reply to a query I made to Col. William S. Pritchard of Birmingham, in regard to the deductibility of an individual's income tax for a gift of this sort. You will note that Col. Pritchard in his reply to me has set out the position the Government has taken in the matter as regards Federal Income Tax, but Col. Pritchard would be very happy to have your opinion as regards the deductibility of an individual's State income Tax in respect to a gift for the erection of a State building, or a War Memorial.

"As the head of the Alabama State Department of Archives and History which will be housed in the building, as you know, I ask you to please give me your opinion on the subject as relates to Alabama."

The deductibility of contributions to institutions is based upon the following statute of the State of Alabama:

"DEDUCTIONS (Individuals). In computing net income, there shall be allowed as deductions:

(j) Contributions or gifts made within the taxable year to recognized religious, charitable and scientific or educational instiiutions or institutions for the prevention of cruelty to children or animals which are not operated for profit, and no part of the net earnings of which inures to the benefit of any private stockholder or individual, *** the amount of such deduction not to be, however, in excess of 15 per cent of the taxpayer's net income as computed without the benefit of this paragraph. Such contributions or gifts shall be allowable as deductions only where made to institutions recognized as institutions for the above purposes under the rules and regulations prescribed by the State Tax Commission."

The right to deduct contributions for building the proposed memorial is therefore dependent on the rules and regulations prescribed by the State Tax Commission. Proper rules and regulations exempting contributions to the proposed memorial would be valid in my opinion.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 7, 1936

Hon. R. E. Adams,
Judge of Probate,
Escambia County,
Brewton, Alabama.

Redemption - Deed from Probate Judge.

The Probate Judge is required to execute deed to purchaser at tax sale other than the State or to the assignee of the certificate, after expiration of two years if sale was prior to April 19, 1933 and after the expiration of three years from sale if sale was subsequent to April 19, 1933.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter stating:

"Where the State of Alabama has become the purchaser of land under a tax sale and has thereafter assigned the certificate of purchase to an individual under Section 235 of House Bill No. 324 approved July 10, 1935, is the Probate Judge authorized to execute a tax deed in the event there is no redemption from the sale, and if so, how many years must the property be sold before the tax deed can be legally executed?

"The form submitted to me and signed by the State Tax Commissioner of Alabama is in the form of a release and states that 'the State Tax Commission of Alabama certifies that all claims by the State acquired by tax sale aforesaid to the lands described are hereby **released** to the said A. B.' Under this form adopted is it proper to issue a deed or is it in effect merely a redemption?

"If we issue deeds will it be necessary to first notify the original owner so as to give him an opportunity to redeem, as the State is required to do if it had not transferred the certificate to an individual?"

In reply, I call to your attention Section 266 of the Revenue Act of 1919 which provides in part:

"275. Deed to purchaser. - After the expiration of two years from the date of the sale of any real estate for taxes, the judge of probate then in office must execute and deliver to the purchaser, other than the State **or person to whom the certificate of purchase has been assigned,** upon the return of the certificate and payment of a fee of one dollar to the judge of probate, a deed to each lot or parcel of real estate sold to the purchaser and remaining unredeemed, including therein, if desired by the purchaser, any number of parcels, or lots purchased by him at such sale; and such deed shall convey to and vest in the grantee all the right, title, interest and estate of the person whose duty it was to pay the taxes on such real estate, and the lien and claim of the State and county thereto, but it shall not convey the right, title or interest of any reversioner or remainderman therein."

After the expiration of **two years** from the date of sale of any real estate for taxes, the Judge of Probate then in office must execute and deliver to the purchaser, other than the State, **or person to whom the certificate of purchase has been assigned,** upon the return of the certificate and payment of a fee of one dollar to the Judge of Probate a deed, etc.

The foregoing was amended by Act approved April 19, 1933 (Acts 1933, p.130) in haec verba, except "two years" was changed to "three years".

This provision appears as Section 241 of the 1935 Revenue Act in the identical words of the 1933 Act.

You will note the words "or person to whom the certificate has been assigned" appearing in each of the statutes. In the absence of redemption after two years from date of sale, if same was made prior to April 19, 1933, you should execute deed to the purchaser or assignee of the certificate.

If the sale was made after April 19, 1933, you should execute such deed after three years from date of sale.

The form of assignment from the State Tax Commission, is intended to be an assignment of the State's interest in my judgement.

I find no requirement that you notify the original owner before issuing the deed.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 7, 1936

Hon. L. L. Hendrix, Clerk,
Monroe County Board of Revenue,
Monroeville, Alabama.

County Health Officer -County Health Officer may handle registration of births and deaths without violating Section 280 of the Constitution of 1901 and Section 2575, Code of Alabama 1923.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of January 18, 1936 requesting my opinion as follows:

"Would it be permissible under the law for the County Health Officer of Monroe County to do what is commonly called the Jail practice, and handle the registration of births and deaths as a part of his duties as County Health officer, and without additional compensation."

In my opinion, your inquiry should be answered in the affirmative.

Neither Section 280 of the Constitution of 1901 which provides as follows:

"No person holding an office of profit under the United States, except postmasters, whose annual salaries do not exceed two hundred dollars, shall, during his continuance in such office, hold any office of profit under this State; nor, unless otherwise provided in this constitution, shall any person hold two offices of profit at one and the same time under this state, except justices of the peace, constables, notaries public, and commissioner of deeds".

nor Section 2675 of the 1923 Code of Alabama, part 7 of which provides:

"No person holding an office of profit under the United States, shall, during his continuance in such office, hold any office of profit under this

state; nor shall any person hold two offices of profit at one and the same time under this state, except notaries public."

have application to the office of County Health Officer, such officer not being an **officer** of the state within the meaning of the above cited sections. **Harrington vs. State,** 76 So. 422; **State vs. Sanders,** 187 Ala. 79; and **Biennial Report of the Attorney General** 1918-1920, page 99.

Accordingly, there being no inhibition against such Health Officer holding two offices, he may properly handle the registration of births and deaths as provided by Section 1068 of the 1923 Code of Alabama.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 7, 1936

Hon. Alex Brantley,
Judge of Probate,
Pike County,
Troy, Alabama.

Counties--Refunding warrants issued for refunding temporary loans outstanding as of October 1, 1935, under Sections 9 and 10 of Act No. 379 H. B. 191, approved September 9, 1935, known as the "County Financial Control Act," and refunding warrants issued for emergencies under Section 17 of said Act are in same category as to preferences.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of January 17, 1936, which is as follows:

"Pike County has, at this time, a $60,000.00 Tax Anticipation Loan which was outstanding at the time House Bill No. 191, known as the 'County Financial and Control Act' was approved and it is our desire to refund this $60,000.00 loan.

"I would like very much to have your official opinion on the following:

"1. If a County refunds a Tax Anticipation Loan as authorized under Sections 9 and 11 of House Bill 191, and afterwards makes a temporary loan as authorized by Section 17 of House Bill 191, which loan has priority?

"2. In refunding a Tax Anticipation Loan as authorized under Sections 9 and 11 of House Bill 191, what funds should be pledged to meet yearly payments and interest of said loan?"

The refunding of temporary loans outstanding at the time Act No. 379, H. B. 191, approved September 9, 1935, known as the "County Financial Control Act" became effective, viz., October 1, 1935, is governed by Sections 9 and 10 of said Act. (Opinion of Attorney General to Judge of Probate of Talladega County on December 6, 1935). Section 9 provides in part as follows:

"With the consent of the holders thereof, any county may refund, under the provisions of this Act, temporary loans outstanding when this Act goes into effect made in anticipation of the collection of taxes for the time and under the conditions and terms provided herein for the refunding of outstanding warrants."

It will be noted that the refunding is to be done under the conditions and terms provided for the refunding of outstanding warrants. In other words, the refunding warrants are payable over a period not exceeding twenty years and become a charge against the General Fund of the County in the fiscal year in which the principal and interest are payable respectively. The amount due on refunding warrants in any fiscal year should be set up in the budget for that year. Section 11 has no bearing on refunding temporary loans but applies only to new temporary loans.

In cases of emergencies refunding warrants may be issued under the provisions of Section 17 of the County Financial Control Act, supra, which provides as follows:

> "Section 17. --EMERGENCIES. In the event any situation over which the Board of Revenue, County Commissioners or other like governing body has no control results in an appreciable obligation against the county over and above what said Board has reason to anticipate, and for which no moneys from the current year's income are available to pay, such board may issue its interest bearing warrants, as now authorized by law, in an amount sufficient to pay such emergency obligation. And the interest and maturities or principal of such loans shall constitute a part of the budget for the year in which they mature. But before such warrants shall be authorized or sold under this Section, such Board shall inquire into and find that such emergency obligation has accrued and such finding spread upon the minutes of its proceedings."

It will be noted that the warrants issued under this section are issued as now authorized by law. This in my opinion means as now provided for the issuance of refunding warrants under Sections 9 and 10 of the Act. Section 17 further specifically provides that the principal and interest of such loans shall constitute a part of the budget for the year in which they mature.

The premises considered, it is my opinion that the refunding warrants issued for the refunding of a temporary loan outstanding as of October 1, 1935 and refunding warrants issued under Section 17, supra, for emergencies are in the same category. Both are charges against the General Fund and are payable out of the funds of the fiscal year in which they fall due.

Specifically answering your first inquiry, I am of the opinion that neither of the loans in question would have priority over the other.

In answer to your second inquiry, it is my opinion that refunding warrants are payable out of the General Fund. As to the relation of current operating expenses of a county and refunding warrants in the matter of preference, I wish to refer you to the case of Rhodes v. Marengo County Bank, 205 Ala. 667 88 So. 85. This presents a question of fact involving the financial condition of the county and the items included in the budget for any fiscal year. **--Opinion of Attorney General to County Treasurer of Conecuh County on November 20, 1935.**

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 7, 1936

Dr. A. H. Collins, Commissioner,
Department of Public Welfare,
State Capitol,
Montgomery, Alabama.

Public Welfare-- Department of Public Welfare held to be without authority to set up system of accounting and disbursing of County Funds by State Department.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of January 8th, 1936 in which you request my opinion as follows:

"I will thank you to advise me whether the State Board of Public Welfare is authorized to prescribe the procedure of accounting for the disbursing of funds made available for the provisions as contained in the Social Security Act and the general relief program of the State. These funds are to be derived from Federal, State and County sources.

"The proposed procedure for the accounting and disbursing of these funds would be to have all records maintained in the State Department of Public Welfare and checks drawn directly in favor of qualified participants of any of these grants, when such participants are shown as being duly qualified as evidenced by properly executed certifications issued by the County Directors of Public Welfare, would be on file in this Department. This procedure would necessitate all funds made available by the Federal Government, by the State and by the County Units to be placed subject to requisition or draft by a qualified bonded official of this Department. In the establishment of this procedure we would eliminate the necessity of maintaining Accountants or Disbursing Officers in each of the several County Departments of Public Welfare of the State, which would reduce the administrative cost approximately $7500.00 per month.

"The provisions as contained in sections three, seven. eight and ten of Act No. 496 and the provisions as contained in section thirteen, fourteen and fifteen of Act No. 448 of the 1935 Session of the Legislature pertain to the administration of funds appropriated or made available for the purposes of aid to dependent children and old age assistance.

"In view of the general provisions delegating authority to the State Department of Public Welfare to administer the funds as referred to above and especially in view of the provisions as contained in sub-section six of section eight of Act No. 332 of the 1935 Session of the Legislature, I will thank you to advise me as to whether this department will be abiding by all legal regulations in establishing a procedure for the administering of these funds as is set out in the proposed system as described in the preceding paragraph."

In reply, I wish to advise that the answer to your question represents careful consideration of the provisions of law contained in Senate Bills 365 -Walton, 402-Walton and 397-Simpson, all of which were passed by the 1935 Legislature, excerpt from which you enclosed in your request. You quote Section 14 of S. B. 365-Walton (Act No. 332) as follows:

"When Federal and State Funds are available for use by County Boards, they shall be allocated by the State Board. Due consideration shall be given in the allocation of these funds to population, extent of need and the financial condition of the County."

I wish to call your attention to the last sentence of the quoted excerpt from Section 14, supra.

In my opinion, authority is here given the "State Board" to allocate the funds provided by the State and Federal Governments giving consideration to population, extent of need, and financial condition of the county concerned; but no authority to administer the actual expediture of the funds as outlined in your request, supra, may be found in these provisions.

You quote Section 5 of S. B. 365-Walton, supra, as follows:

"The State Board shall have the authority to decide with reference to the use of grants-in-aid, to County Departments of Public Welfare hereinafter created, for particular purposes according to the availability and adequacy of the facilities under the control of the local authorities to administer such grants-in-aid. In administering any such funds for grants-in-aid to local authorities the State Board shall have the following powers: (2) To require as a condition for receiving grants-in-aid that the County Department of Public Welfare shall bear a fixed proportion of the total expenses of furnishing these services. These proportions shall be determined in a uniform way throughout the State based upon such considerations as the amount of funds available to the State Department and the resources of the several local governments."

In my judgement, no power is granted to the State Department in this Section to make the requirements outlined in your request.

You quote Section 3 of S. B. 402-Walton (Act No. 496) as follows:

"(a) The State Department of Public Welfare shall have the administration of all funds appropriated or made available to it for the purposes of this Act. It shall be empowered to cooperate with the Federal Government in the development of plans and policies for aid to dependent children. It shall receive and administer such Federal funds as are made available and shall prepare and submit such reports as may be required by the Federal Government with respect to aid to dependent children. (b) County Departments of public welfare shall be charged with the administration of all funds appropriated or made available in the several counties for aid to dependent children."

In my judgement, this section authorizes State Department to administer only those funds appropriated or made available to it.

This contention is confirmed by the provision of part (b) quoted, supra which charges the county departments of public welfare with the duty of administering all the funds appropriated or made available in the several counties for aid to dependent children.

It is, therefore, my judgement that no authority is hereby contained to authorize the procedure outlined in your request, supra.

You quote Section 10 of the above named Act:

"All funds appropriated or made available to the State Department of Public Welfare for assistance to the several counties in carrying out

the provisions of this Act shall be allotted to the several counties on the basis of their expenditures for aid to dependent children provided, however, that the State Department of Public Welfare shall grant to each County an amount equivalent to one-half of their expenditures for administrative purposes in connection with the operation of this Act."

In my judgement, this section provides for no other procedure as outlined in your request.

You call particular attention to Section (6) of Section 8 of Act No. 332 or S. B. 365-Walton, supra, as follows:

"Act as the agent of the Federal Government in welfare matters of mutual concern, and in the administration of any **Federal funds** granted to the State to aid in the furtherance of any of the functions of the State Department, and be empowered to meet such Federal standards as may be established for the administration of **such funds**."

In my opinion, this section grants authority to the State Department of Public Welfare to administer any Federal funds granted to the State in the manner provided for by such Federal standards as may be established for the administration of such funds. This administration of "such funds" is provided for, however, by the terms of Senate Bills 402-Walton and 397-Simpson above quoted and referred to. In none of these provisions, however, do I find authority which, in my opinion, authorizes the State Department of Public Welfare to establish the procedure of administering these funds as outlined in your request.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 7, 1936

Hon. J. B. Van Valkenburg, Chairman,
Board of County Commissioners of
Madison County,
Huntsville, Alabama.

Courts of County Commissioners- Right to purchase an air field.

1. Right of Board to purchase air field determined by facts.

2. The facts set up are not such as to constitute an emergency within the meaning of Section 17 of the County Financial Control Act (Act 379 H. 191, Lee).

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I am in receipt of your letter of January 2, 1936 requesting my opinion as follows:

"Will you kindly give us your opinion upon the following questions?

"1- Has this Board of Commissioners authority to purchase on behalf of the County, or to join the City of Huntsville to purchase on behalf of Madison County and the City of Huntsville jointly the necessary lands for the construction of an air port where the funds for the construction

of the air port are to be furnished by the United States Government or one of its agencies?

"2- If your answer to the above question is in the affirmative, then please advise us if this Board of Commissioners could declare the purchase of such lands for such purposes as an emergency within the meaning of Section 17 of the Act of the Legislature of Alabama, approved September 9, 1935, and known as the "County Financial Control Act", so as to authorize the issuance of warrants under the provisions of said section of said act for the purchase of such lands.

"If the Federal Agencies are to construct such an air port, it will be necessary for the required lands to be procured without undue delay and for this reason we would greatly appreciate a very early reply from you to the above inquiries."

As set forth in the case of Stone v. State, 223 Ala. 426, 136 So. 727, the right of a Board of Revenue to make an appropriation in a case such as you mention, is determined largely by the primary purpose of the Board in making the appropriation, and is therefore a question of fact. One fact to be considered, for instance, might be the cost of the land as compared with the proposed cost of the contemplated construction work.

For your information, under facts set forth by the Montgomery County Board of Revenue, this department ruled under date of March 16, 1929 that the County could appropriate funds for the purchase of land to be used in the construction of Maxwell Field.

Even though the facts in the present instance would permit the proposed appropriation of funds, I do not think that this is such an emergency as is contemplated in Section 17 of the County Financial Control Act. (Act 379, H. 191 by Lee). Section 17 provides:

"In the event any situation over which the Board of Revenue, County Commissioners or other like governing body has no control results in an appreciable obligation against the county over and above what said Board has reason to anticipate, and for which no moneys from the current year's income are available to pay, such court may issue its interest bearing warrant, as now authorized by law, in an amount sufficient to pay such emergency obligation. * * * "

Even if the Board is authorized to make the purchase, an obligation could result only by the act of the Board and it would not be a situation over which the Board "has no control". I am of the opinion, therefore, that such appropriation would not be such an emergency as contemplated by Section 17 of said Act.

Yours very truly,
A. A. CARMICHAEL,
Attorney General

February 7, 1936

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Statutes - Repeal of special laws - Schedule 156.9 of the Revenue Act of 1935 is in direct conflict with an Act approved November 8, 1932 (General Acts 1932, p. 225), and, therefore, together with Section 411 of the Revenue Act of 1935 repeals said Act approved November 8, 1932.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of January 22, 1936, in which you request my opinion as follows:

> "Kindly advise me whether Act 216 approved November 8, 1932 (Acts 1932 page 225) is valid and now in effect, or was repealed by the Revenue Act of 1935, No. 194, approved July 10, 1935 (Schedule 156.9, Section 411) or any other law."

It is my opinion the Act which you refer to is repealed by Schedule 156.9 page 318 Revenue Law 1935. This schedule is in part as follows:

> "One-third of the proceeds of the excise tax herein imposed, less cost of collection and administering this Chapter, shall be paid into the State Treasury to the credit of the sixty-seven counties of the State, and shall be divided and distributed equally among the sixty-seven counties of this State, payment to be made by State warrant to be mailed to the Treasurer of such counties or depositories of such counties, on or before the 10th day of each month following collection. Such funds when received by the County Treasurer shall be expended exclusively in the construction, maintenance and repair of the public roads and bridges in such county. The use or expenditure of any of said funds in any other manner or for any other purpose than as provided herein, **but the** governing body of any County **of** any individual member of said body, shall constitute a misdemeanor."

Section 411 of the Revenue Law 1935, supra, is as follows:

> "Section 411. That all laws or parts of laws in conflict with the provisions of this Act are hereby repealed, provided that all provisions of existing laws relating to taxation and revenue which are not in conflict with the provisions of this Act and which are not herein expressly repealed, are not hereby repealed."

The Act which you refer to above was approved November 8, 1932 (General Acts 1932, page 225) is as follows:

> "Section 1. The Board of Revenue or Court of County Commissioners or other governing body of each and every county in Alabama is hereby authorized and empowered to expend an amount not to exceed one-third of the total amount that may be received by each county from the levy and collection of any tax on gasoline in the payment of any debt that may have been heretofore incurred by such county for the construction and/or maintenance of roads or bridges."

Here the various counties of the State are given the power and the right to expend not more than one-third of the total amount by each county received from the Gasoline Fund in the payment of any debt that may have been heretofore incurred by such county for construction and or maintenance of roads or bridges. Schedule 156.9 Revenue Law 1935 quoted above you will note says:

> "that the use or expenditure of any of said funds in any other manner or for any other purpose than is provided herein, **but** the governing body of any County of any individual member of said body, shall constitute a misdemeanor."

You will note the word "but" is used following the expression "than is provided herein" but this is clearly a misprint and should be "by the governing body". Therefore, I think there is a direct conflict between the Act referred to above and the Law as stated in Schedule 156.9 of the Revenue Law of 1935. The schedule says that the gasoline money shall be used only in the construction, maintenance and repair of public roads and bridges of the county and that its use for any other purpose shall constitute a misdemeanor. So, it naturally follows that Section 411, supra, repeals the Act approved November 8, 1932, supra.

What I have said about Schedule 156.9 applies with equal force and effect to Section 156.11, Revenue Code of Alabama, 1935.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 7, 1936

Dr. J. A. Keller,
State Superintendent of Education,
Montgomery, Alabama.

1. Pupil working in mill for experience not under Workmen's Compensation.

2. Responsibility of mill in above circumstances differs from that of school.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of January 22, 1936, requesting my opinion as follows:

"The question has arisen as to whether regular enrolled high school pupils, who are taking a trade and industrial course where laboratory experience is provided in a mill or plant, come under the Workmen's Compensation Act. There is no effort to get production or profit from their work. The sole purpose is to acquaint them with industrial processes They attend High School classes one-half of each school day, pursuing courses designed to acquaint them with the knowledges and techniques of their chosen craft. The other one-half of each school day is spent in an industrial establishment where they are permitted to learn by actually doing the various processes in any given craft.

"As a specific instance, a boy in the second year of high school who is 16 years of age elects textiles as his major course. For two years thereafter he spends one-half of each school day in technical and required subjects in school and the other one-half under the supervision of his teacher in a textile mill, acquiring practical knowledge in all the operations on a progressive schedule. At the end of these two years the young man graduates from high school in the regular manner. In addition, he is granted a certificate in textiles from the State Department of Education. Regular high school credit is given for his supervised experiences in the mill.

"The specific problem is the legal status in regard to the Workmen's Compensation Law, or the responsibility of the mill in case of accidents. It should be understood that the mill is merely cooperating with the schools

to make the pupil's experiences practical in character. The impossibility of providing adequate laboratory facilities within the school building can be readily appreciated.

"The mill derives no return from the pupil's labor. He does not displace any employee. In view of the fact that he never remains on one operation a sufficient length of time to become a profitable operative, it is reasonable to believe that the mill actually suffers some loss rather than a profit in cooperating with the schools in an enterprise of this kind.

"In order that a thorough understanding of the situation may be had by all interested, it is requested that an opinion be given, stating:

"1. Would the company permitting the use of its facilities for laboratory purposes be any more liable in case of injury to the pupil than a school would be if a pupil were injured on similar machines in a school laboratory?

"2. If there is a liability on the company, to what extent would the company be responsible?"

In answering your inquiry, I call your attention to the fact that an official opinion is for the guidance and protection of certain public officers only. ((Section 869, Code of Alabama, 1923, 6 Corpus Juris 812). **Obviously a private corporation would not be protected by a ruling of this Department.**

For your information, however, I believe that the pupils, under the circumstances set forth, are not under the Workmen's Compensation Act. In the much cited case of Birmingham Post Co. v. Sturgeon, 149 So. 74, the Alabama Supreme Court quotes with approval the following from Honnold on Workmen's Compensation:

" 'The Compensation law does not apply where the injured person is an independent contractor, and the relation of employer and employee does not exist. It is not possible to lay down a hard and fast rule or state definite facts by which the status of men working and contracting together can be definitely defined in all cases as employee or independent contractor. Each case must depend on its own facts. Ordinarily no one feature of the relation is determinative, but all must be considered together.' '

The court further points out in that case:

"The term 'employer' as used herein shall mean every person not excluded by Section 7543 who employs another to perform a service for hire and to whom the 'employer' **directly pays wages.**"
(Underscoring supplied).

Answering your questions numbered 1 and 2, the liability of the Company would be different from that of the school. The school escapes liability generally as a part of the government. (56 Corpus Juris 528, Paragraph 621. (The Company, on the other hand, would be liable for negligence. What constitutes negligence under given circumstances is, of course, a question of fact.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 7, 1936

Hon. Chas. W. Lee,
State Comptroller,
Capitol.

Costs and Fees--When payable from Convict Fund; when payable from Fine and Forfeiture Fund.

Note; Numbers in syllabus indicate number of question.

Clerk's Fees--

1. Clerk entitled to fee of fifty (50) cents **once** for each capias or warrant issued; held not entitled to fee for alias capias or warrant issued.

2, 3 and 5. Convict Department held not liable for payment of clerks' fees in "Forfeiture Cases."

4. Execution for Costs --

(A) Fine and Forfeiture Fund held not liable to pay costs of judgment for costs against defendant, at any time before payment thereof.

(a) Applicable in both Hard Labor and Felony cases.

(b) Labor of convict held to be extinguishment pro tanto of debt for costs.

6. Fine and Forfeiture Fund --

(A) Fine and Forfeiture Fund held not liable to pay costs of "Forfeiture of Bond" cases.

7. Sheriffs' Fees --

Sheriff held entitled to $4.00 in Felony case; $2.00 in Misdemeanor case for executing **warrant or arrest issued by Justice of the Peace.**

9 and 10. Sheriffs' Fees --

Convict Department held not liable for payment of sheriffs' fees in "Bond Forfeiture" cases.

11. Sheriffs' Fees --

Fine and Forfeiture Fund held not liable for payment of sheriffs' fees in "Bond Forfeiture" cases.

12 and 13. Sheriffs Fees --

Convict Department held liable for payment of $1.00 fee to sheriff for approving Appearance Bond of defendant to answer indictment returned by Grand Jury.

14 and 15. Sheriffs' Fees --

Convict Department held liable for payment of $1.00 fee of sheriff for approving bond of defendant when previous bond has been declared insufficient and defendant ordered rearrested by Circuit Court.

16 and 17. Sheriffs' Fees --

Convict Department held liable for payment of fees of sheriff serving subpoenas for witnesses to appear before Justice of the Peace in preliminary trial.

18. Sheriffs' Fees --

Convict Department held liable for payment of $1.00 for fee of sheriff for committing defendant to jail on mittimus issued by Justice of the Peace.

19. Sheriffs' Fees --

Convict Department held liable for payment of $1.00 for fee of sheriff for committing defendant to jail on capias issued by clerk when defentdant's bond was forfeited by failure to appear for trial.

20. Sheriffs' Fees --

Convict Department held not liable for payment of $1.00 for fee of sheriff for committing defendant to jail upon forfeiture of bond or failure to surrender within fifteen days after his case was affirmed.

22. Sheriffs' Fees --

Fine and Forfeiture Fund held liable for payment of guard fees upon return of execution "No property found".

23 and 26. Justice of the Peace --

Duty to approve bond of defendant when bail is allowed and bond is immediately offered, on preliminary, held to be upon Justice of the Peace.

24. Bail --

Sheriff held to have no authority to approve bond of defendant returnable to Justice of the Peace prior to bringing him before the Justice of the Peace when Justice of the Peace does not have final jurisdiction of the offense charged.

28. Justice of the Peace --

Convict Department held liable for payment of fee of fifty (50) cents for approval of bond by Justice of the Peace upon receiving the defendant in the penitentiary.

29 and 30. Sheriffs' Fees --

Sheriff held entitled to $4.00 for executing capias or writ of arrest charging felony even though defendant be finally convicted of misdemeanor.

(A) Convict Department held liable to pay $4.00 upon receiving defendant in the penitentiary.

31. Solicitors' Fees --

Solicitors' fees held to be $10.00 in cases of "Conviction of misdemeanor not otherwise provided for."

Opinion by Assistant Attorney General Small.

Dear Sir:

You request my opinion as follows:

"A defendant is arrested by the Sheriff on a warrant issued by a Justice of the Peace and on preliminary hearing he is bound over to await action of the Grand Jury. The Justice of the Peace sets his bond at $300.00 and upon his failure to make such bond he is committed to jail. A few days later bond for his appearance at the next term of the circuit court, etc., in the sum of $300.00 is approved by the Sheriff and he is released. The next Grand Jury returns an indictment against the defendant for the offense as charged in the warrant issued by the Justice of the Peace, and when such indictment is presented to the Circuit Judge, he declares the bond of $300.00 insufficient and orders the defendant rearrested, setting the amount of his bond at $500.00. The Clerk issues a capias or writ of arrest which the Sheriff executes by placing the defendant under bond of $500.00. The case is called for trial and the defendant fails to appear and his bond is ordered forfeited, alias capias issued, and new bond set at $750.00 by the Circuit Judge. The Clerk issues the alias capias and the Sheriff executes such alias capias by placing the defendant in jail and a few days later releases him, bond in the sum of $750.00 having been made. At the next term of the court the defendant is found guilty and sentenced to the penitentiary, from which judgement he appeals and is released under bond as provided by Section 3241, Code of 1923. The case is affirmed by the Court of Appeals or Supreme Court and the defendant fails to surrender himself to the Sheriff within fifteen days as is provided by Section 3245, Code of 1923. The Sheriff endorses his bond forfeited, writ of arrest is issued by the Clerk and the Sheriff executes same by placing the defendant in jail. The Sheriff delivers the defendant to the Transfer Agent of the Convict Department a few days later and he is carried to the penitentiary. The Sheriff served five subpoenas for witnesses to appear before the Justice of the Peace on preliminary, five subpoenas for witnesses to appear before the Court of Conviction.

"The Clerk of the Circuit Court sends to the Convict Department a cost bill, on form furnished by such Department, a copy of which is hereto attached as follows:

Clerk's Fees		**Witnesses before Grand Jury**
Issue 5 Subpoena, G. J.	$1.25	(Names of 5 witnesses listed and
" 8 " Trial	2.00	amount due if attendance is
Docketing	.10	proven.)
Issue capias (3)	1.50	(Warrant of arrest issued by
Trial	.50	Justice of the Peace was executed
Judgment	.25	by Sheriff.)
Final Judgment	.25	(Bond declared insufficient and
Record Supreme Court	3.50	raised from $300.00 to $500.00. De-
Final Record	3.00	fendant ordered rearrested by
Forfeiture (2)	1.00	Circuit Judge.)
Transcript	.75	(Forfeiture taken at ———term of
	$14.10	Court.)

Sheriff's Fees

Arrest (4)	$16.00
Approve Bond (3)	3.00
Serve Subpoena (5) Prelim.	2.50
" " (5) G. J.	2.50
" " (8)	4.00
Commit Jail (3)	3.00
Total	$31.00

Justice and Constable Preliminary Trial.

Complaint	$ .25
Warrant	.50
Issue 5 subpoena	1.25
Mittimus	.25
Total	$ 2.25

RECAPITULATION

Stenographer	$ 3.00
Clerk's fees	14.10
Sheriff's fees	31.00
Magistrate, etc.	2 25
Total	$50.35

(Defendant failed to surrender within fifteen days after his case was affirmed, his bond was indorsed forfeited, capias was issued and he was arrested and committed to jail by Sheriff as per Section 3245, Code of 1923.)

Witnesses before Court of Conviction.

(Term of Court)
(Name of 4 witnesses listed and amount due if attendance proven.)
(Term of Court)
(Name of 4 witnesses listed and amount due if attendance proven.)

Taking into consideration the above statement of facts, Sections 3241, 3245, 3278, 3381, 3388, 3667, 3739, 3741 and 3753 Code of 1923 and 122 Ala. 394 (25 So. 194)."

I have taken the liberty to quote your questions in the opinion above the answers in chronological order.

"Question 1. The Clerk having issued capias three times, would the Convict Department under Section 3667, have to pay fifty cents as a fee for the Clerk for capias issued when the bond was declared insufficient by the Circuit Judge, taking into consideration the word **once** as used in Section 3667 and the fact that the Justice of the Peace has a fee of fifty cents for issuing warrant of arrest on preliminary?"

The first question involves the construction of the statute governing payment from the Convict Fund. (Section 3667, Code of Alabama, 1923). This statute sets out the amount payable for certain items of costs payable for services rendered by certain county officers. The issue of a capias or warrant of arrest is a duty of the Clerk of the Court. For this service the statute provides the payment as follows: "For issuing each capias or warrant (once) fifty cents;"

In my judgement the word **once as** used in this statute, is applicable to the fees of the Clerk and limits such payment to only one payment for each capias or warrant issued against the defendant regardless of the number of alias writs issued by the Clerk.

Reference is made to "the fact that the Justice of the Peace has a fee of fifty cents for issuing a warrant of arrest on preliminary." In my judgment, the word **once,** as used here, is not applicable to the fees of the Justice of the Peace. The items of costs payable to the committing magis-

trate and the constable are provided for by separate and distinct provision of the same statute which reads as follows: "cost of committing magistrate and constables on preliminary trial, both together not to exceed five dollars;"

This provision is a limitation by its own language upon the fees of the officers earned in and upon the preliminary proceedings. The word **once** as used in this section, in my judgment, is not to be interpreted as a limitation upon the section as a whole, applying to the preliminary proceedings as well as the clerks fees, but is a limitation upon the clerk's fees only. I refer you to the following opinions of the Attorney General:

Biennial Report 1932-34, page 226 (Vol. 1, Office Edition, p. 172, Opinion to Hon. Bradford Cooper, County Treasurer, Marion County, rendered Feb. 9, 1924.)

Biennial Report of Attorney General 1928-30, pp. 438, 711.

Biennial Report of Attorney General 1926-28, p. 702, Vol. 6, Office Edition, p. 176, Opinion to Hon. Wm. F. Feagin, Director, Board of Administration, Capitol, October 2, 1931; Vol. 1, Office Edition, p. 225, Opinion to Mr. Roy Sanderson, Circuit Clerk, Houston County, April 22, 1925.

Vol. 1, Office Edition, p. 233, Opinion to Hon. B. Cooper, County Treasurer, Marion County, April 29, 1925.

Book 6-A, Office Edition, page 93, Opinion to Hon. Chas. W. Lee, State Comptroller, Sept. 4, 1935.

"Question 2. The Clerk having issued a capias three times, would the Convict Department, under Section 3667, have to pay fifty cents as a fee for the Clerk for capias issued when forfeiture was taken when the defendant failed to appear for trial, taking into consideration the word **once** as used in Section 3667?"

In my judgment, your second question must be answered in the negative, since the writ here mentioned is an alias writ. I refer you to the answer to your first question and the limitations set out there.

"Question 3. The Clerk having issued capias three times, would the Convict Department, under Section 3667, have to pay fifty cents as a fee for the Clerk for capias issued when the defendant failed to surrender, taking into consideration the word **once** as used in Section 3667?"

In my judgement the third question should be answered in the negative for the reasons stated in answer to questions 1 and 2, supra.

"Question 4. In the event your answer to either or all of questions 1, 2 and 3 is in the negative would each such fee not paid by the Convict Department be a proper charge against the Fine and Forfeiture Fund, upon return of execution 'no property found' under Section 4039 as amended by Act 1927, page 45?"

The answer to your fourth question must necessarily decide first, when, if, at all, execution may issue against the defendant in both felony and hard labor cases.

This question presents no little difficulty due to the scarcity of authorities, and much must necessarily be left to inferences drawn from the few

authorities kindred to the question, that are available. As a condition precedent in criminal cases, payment from the fine and forfeiture fund must necessarily be conditioned upon a valid judgment.

See Hendon vs. Delvichio, 137 Ala. 594.

Costs accrue in two types of criminal cases. In misdemeanor or hard labor cases, a definite sentence is imposed for payment of costs in the event that the defendant fails to presently pay such costs or confess judgment with good and sufficient sureties therefor. Code 1923, Section 5290, provides in part as follows:

> "If the fine and costs are not paid, or a judgment confessed, according to the provisions of the preceding section, the defendant must either be imprisoned in the county jail, or at the discretion of the court, sentenced to hard labor for the county, * * * * * "

In felony cases, quite a different situation arises. No additional sentence is imposed to pay costs. It becomes necessary therefore, to determine when execution against a defendant may issue in both misdemeanor cases and in felony cases.

Section 3741, Code of Alabama, 1923, referring to removal of prisoners, reads in part as follows:

> "If such prisoner is convicted, the Clerk of the Court in which conviction is had shall tax the cost of such removal against him **and shall immediately upon the adjournment of the Court issue execution therefor, and for the other costs."**

This last clause, which I have emphasized, is clearly mandatory. The costs of conviction in a felony case constitute a debt, and are chargeable to the defendant upon conviction. Since no other remedy for collection is permitted and execution therefor is commanded, the conclusion must be that upon a valid judgment against the defendant for costs, an execution must issue, and being returned "no property found" such costs are payable from the fine and forfeiture fund.

Criminal cases are of two classes—Misdemeanors and felonies.

I. Misdemeanor or Hard Labor Cases.

Considering hard labor cases first, the question as to when execution may issue will be confined to those cases in which the defendant is sentenced to pay the costs.

The sentence for costs may not exceed ten months and the convict must be allowed a credit of seventy-five cents per day for his labor, on the costs adjudged against him. (See Code 1923, Section 5291). When sentence is imposed, it is for the purpose of forcing payment of costs, but it is not an exclusive method of collection of these costs.

In the case of Clark vs. State, 26 Ala. App. 196, the Court said:

> "It is insisted that the court was in error in sentencing the defendent to hard labor for the payment of the sheriff's removal bill. The ground of the objection to that part of the sentence is that the statute (Code 1907, Section 6638, last clause) which authorizes the taxation of that item of cost, provides only for the use of execution against the defendant therefor; and it is insisted that there is no authority of

law for including that item in the amount which is made the basis of the court's determination of the period of hard labor required to work out the costs, when the defendant fails to pay them or to confess judgment therefor. In other words, the contention is that the effect of the provision above mentioned is to make execution against the defendant the exclusive method of enforcing the collection of the sheriff's removal fee and expenses. This contention cannot be sustained. Section 6638 of the Code, in which that provision is found, prescribes the fees and allowances to which the sheriff is entitled in criminal cases, and does not deal with the question of sentencing the defendant to hard labor to pay the costs of the prosecution. Sections 6584 and 7635 of the Code contain the applicable provisions of the law on that subject. By the express terms the last mentioned Section, 'If the costs are not presently paid or judgment confessed therefor as provided by law, then the Court may impose additional hard labor for the county for such period not to exceed ten months, as may be sufficient to pay the costs, at the rate,' etc. In such a case as the present one, the amount due to the sheriff for the removal of he defendant is as much a part of 'the costs' as any other item mentioned in Section 6638 of the Code. If the provision for issuance of an execution, contained in the last clause of that section, could be construed as having the effect of making an execution against the defendant the exclusive method of enforcing the collection of that item of costs, it would follow that nothing but an execution could be resorted to for the collection of any of the costs of the prosecution in such a case as the execution there provided for is not merely for the removal fees and expenses, but also 'for the other costs.' Plain ly such a construction is not permissible, as the result would be to prevent obedience to the explicit requirements of Sections 6584 and 7635 of the Code."

From the language used in the above quoted case, in my judgment both methods of collection of costs—execution and sentence to hard labor—may co-exist. If this be true then it must follow that execution may issue at any time there is an unpaid balance due upon the costs, and execution could issue, subject to the provisions of the law governing such issue, at any time until the convict had actually paid the costs by his labor. It is only the labor performed or the time actually served that lessens the convict's liability for costs. The hard labor performed by the convict is an extinguishment pro tanto of his liability for costs and of course execution will not issue for costs or any part of them paid in labor. It is not to be supposed that the legislature intended the convict to pay costs twice—once under execution and once by labor.

These inferences result from a consideration of the language used in the case of Clark vs. State, supra, and the language of Chief Justice Stone used in construing Section 4504 of the Code of 1886, which corresponds substantially to our present code with the exception of the length of the sentence and the rate per day allowed, and contracts for hire of convicts which of course, has been eliminated in Alabama. In this case the Chief Justice said:

"Under the statute, if the labor of the convict, at the rate per day fixed by the presiding judge pays the whole adjudged costs in less than eight months, whenever the payment is completed, the prisoner is entitled to his discharge. On the other hand, if at the rate fixed it re-

quires more than eight months to make such payment in full, then the term of the imprisonment on that account cannot be extended beyond that term. This is a mere boon extended to convicted offenders, by shortening the term of the alternate mode of collection. It is not a release of the residue of the costs.

"The amount of the costs adjudged in this case was $172.75, whereas the wages of the prisoner for eight months, at thirty cents, would amount to only seventy-two dollars. His right to be discharged from the sentence against him for costs depends, not on the payment of the balance of $72.00, as claimed by him, but on the payment of the balance of $172.75, the costs adjudged against him.

"Upon the payment of the costs—the whole adjudged costs, less the part paid in labor—the defendant will be entitled to his discharge, but not till then."

I wish to refer you to an opinion rendered by the Attorney General to Hon. Chas. E. McCall, Chief Examiner of Public Accounts, Capitol, on December 29, 1921. I do not endorse this opinion in toto, due to the fact that the law has suffered many changes since this opinion was written, but the following quotation I think not only pertinent but a correct statement of the law.

"It is only the hard labor actually performed by the convict which lessens his liability for costs; if while he is serving a sentence for costs it is dicovered that he is the owner of property, execution may be levied upon that property for the balance of the costs not yet worked out. (Subject of course to the existence of a valid judgment for the costs). Further if the convict is discharged at the end of ten months (the statutory limit of imprisonment for costs), execution may be levied for any balance then due remaining unpaid." (The first parenthesis supplied is my own).

Of course, if the defendant has served out his sentence for costs, with no balance remaining due, and no execution having been issued against him, then no execution may issue. He has discharged his debt by his labor, and he may not be compelled to pay twice.

In the case of Mims, County Treas. vs. State, ex rel. Stallworth, Sheriff. et al. 61 So. 811, the court said:

"The fact that the claims have been paid in part by the proceeds of the convict's labor is no bar to the assertion of the claim, in any legal way, to the extent that they remain unpaid."

The language of the statute (Code 1923, Section 5291): "the court may impose additional hard labor for the county for such period, not to exceed ten months, as may be sufficient to pay the costs." I do not understand to mean that technically the imprisonment is a payment of costs. I refer you to the early case of State vs. Richardson, 18 Ala. 109, in which the defendant having been convicted and fined one thousand dollars and sentenced to imprisonment in the county jail until the fine and costs were paid. After serving for sometime—

"He was pardoned by the Governor from further imprisonment, but the pardon did not mention the fine. After he was discharged from imprisonment several writs of fieri facias were issued against his property and at the following term (1849) he moved the court to quash

the writs of execution and enter satisfaction of the fine and costs on the ground that the discharge from the imprisonment operated in law as a discharge of the fine. The motion was granted, and the cause is brought here by writ of error at the instance of the State.

"The principle is perfectly settled, that in a civil suit between individuals, if the defendant be in custody under a capias ad satisfaciendum, and is discharged therefrom, with the consent or by the act of the plaintiff, the judgment itself is discharged, and consequently no process can ever after be legally issued thereon, either against the goods or the person of the defendant. Cooper v. Bigelow, 1 Cow. 56; Little vs. The Newberry Bank, 14 Mass. 443; Vigers v. Aldrich, 4 Burr, 2482. The reason why the discharge of the defendant from the arrest discharges the judgment, is this, that when once the defendant is in execution the judgment is satisfied, and if the defendant be released by the consent of the plaintiff, he cannot be again taken in execution, for the debt, in law, is extinguished. Tanner v. Hague, 7 D. & E. 247; Vigers v. Aldrich, 4 Burr. supra * * * But is this rule of the common law applicable to the case before us? The debt is due to the State, being a fine imposed for the commission of a high misdemeanor. We think it perfectly well settled at the common law, that although one be in custody under the judgment of imprisonment until a fine for a misdemeanor be paid, still the King may have process of execution against the goods and chattels, lands and tenements, of the defendant, and if he be not in custody, a capias pro fine may issue against his person, and execution against his goods also, or a writ may issue against his body, goods and chattels, lands and tenements. Rex v. Wolfe, 1 Chitty's R. 401; Rex v. Wade, Skin, R. 12; 2 Barn & Ald, 609.

"The difference then between a private judgment and one for a fine due to the King is this: the imprisonment of the defendant under a private judgment is in law a satisfaction of it, **but the imprisonment of the defendant for the non-payment of a fine is no satisfaction thereof, and execution may issue against his goods, notwithstanding his imprisonment; and as the imprisonment for the non-payment of a fine is not a satisfaction of the judgment, we think it entirely clear that this imprisonment may be released without discharging the debt.** This would be the case in regard to private judgment if the arrest and imprisonment of the defendant did not work a satisfaction of the judgment. Under this view, we think the court erred in quashing the execution and ordering the judgment to be satisfied, for it is certain that it was not the intention of the Executive to release the fine, but the imprisonment alone. Let the judgment be reversed and the cause remanded." (Emphasis supplied).

The above authorities, in my judgment, compel the following conclusions concerning hard labor cases:

1. Execution for costs may issue only upon a valid and unpaid judgment therefor.

2. While the convict may not be compelled to serve more than ten months to pay costs, if after serving the maximum sentence there remains an unpaid balance, execution may issue for said unpaid balance.

3. Execution may issue upon a valid, unpaid judgment at any time before sentence for costs is served, subject to the limitations of the law governing such issuance of execution.

4. The labor of the convict is an extinguishment pro tanto of liability for costs. Such credit for costs must be allowed at the rate of seventy-five cents per day.

5. No execution may issue for costs or any part thereof, previously paid in labor.

Nothing in the above consideration of "hard labor" cases must be construed to apply to fines imposed. For a discussion of fines and their payment see Biennial Report of Attorney General 1926-1928, p. 217.

II. Felony cases.

Considering felony cases, will say that in my judgment as in misdemeanor or labor cases, no execution may issue except upon a valid unpaid judgment for costs.

See Biennial Report of Attorney General 1926-1928, p. 749, and authorities cited; See also Hendon vs. Delvichio, supra. In felony cases, the convict does not work out costs, as he is not sentenced therefor. Such costs are payable however upon proper issue and return of execution "no property found," from the fine and forfeiture fund.

I refer you to the following opinions of the Attorney General:

Biennial Report of the Attorney General 1932-34, pp. 436, 358 with authorities cited.

Biennial Report of the Attorney General 1930-32, pp. 57, 254;

Biennial Report of the Attorney General 1928-30, p. 225, 255;

Biennial Report of the Attorney General 1926-28, p. 749; Book 4, Office Edition, p. 204, Opinion to Mr. H. H. Stewart, Asst. Director, Board of Administration, June 8, 1931;

Vol. 6 Office Edition, p. 89, Opinion to J. C. Coleman, Clerk, Circuit Court, Eutaw, Ala., Sept. 15, 1931.

Vol. 6, Office Edition, p. 322, Opinion to Hon. A. H. Sheppard, Circuit Clerk, Anniston, Oct. 26, 1931;

Vol. 1, Office Edition, p. 191, Opinion to Hon. J. N. Mullins, Circuit Solicitor, Dothan, Ala. Apr. 19, 1926; Vol. 1, Office Edition, p. 196, Opinion to Hon. J. N. Livings, Sheriff, Andalusia, Ala., Apr. 28, 1926;

Vol. 3, Office Edition, p. 402, Opinion to D. A. Howard, Clerk, Circuit Court, Florence, Ala., Nov. 18, 1925;

Vol. 1, Office Edition, p. 233 Opinion to Hon. B. Cooper, County Treasurer, Hamilton, Ala., Apr. 29, 1925.

In so far as the above cited opinions are in agreement with the present opinion, they are hereby adopted; in so far as they are in conflict with the present opinion, they are hereby expressly overruled.

"Question 5. The Clerk having entered a forfeiture two times, would the Convict Department, under Section 3667 have to pay $1.00 as fees of the Clerk, taking into consideration the fact that one forfeiture was entered after the final determination of the case?"

In my opinion, your fifth question must be answered in the affirmative. This fee is specifically provided for by Section 3667, Code of Alabama, 1923, as follows:

".....entering forfeiture against defendant, fifty cents....."

"Question 6. In the event the Convict Department does not have to pay the fee of fifty cents for entering forfeiture after the final determination of the case, would such fee be a proper charge against the Fine and Forfeiture Fund, upon return of execution 'no property found', under Section 4039 as amended by Act of 1927, p. 45?"
See answer to question numbered five.

"Question 7. The Sheriff having executed capias or warrant of arrest four times, would the Convict Department, under Section 3667, have to pay $4.00 in felony case and $2.00 in misdemeanor cases for fee of Sheriff for executing warrant of arrest issued by the Justice of the Peace?"

Your question numbered seven with reference execution of warrant issued by Justice of the Peace should be answered in the affirmative. Section 3667 provides for certain amounts paid for certain items of costs. These fees are provided for in other sections of the Code of 1923. The Acts of 1927, page 53, Section 3 provides as follows:

"Section 3. The Courts of County Commissioners, Board of Revenue, or other like bodies of the several counties of the State, may hereafter, and they are hereby authorized and empowered to, deliver to the State Board of Administration all county convicts heretofore sentenced to hard labor for the county or who may hereafter be sentenced to hard labor for the county, in like manner as now provided by law for the delivery of State convicts to the State Board of Administration. The State Board of Administration shall receive said county convicts in the same manner as they now receive State convicts, **and shall pay to the proper county authorities the items of costs provided in Section 3667 of the Code of Alabama as now provided by law. Provided, however, that where these items of costs have been paid to the proper officers for the convicts now serving their sentence, the same shall not be again paid.**"

It will be seen that this Act has the effect of adding to the items of costs provided for in felony cases (Section 3667 supra) the same items in misdemeanor cases. The Act uses the word **items** and in my judgment the legislative intent here is clearly that its use shall be to specify the acts or duties of the officers which may be included in the costs payable under proper circumstances, by the Convict Department. Fees of officers are penal in their nature and must be provided for by some definite provision of the law authorizing them. The Code of 1923, Section 7255 provides:

"7255. No fee charged unless expressly authorized.—The law of fees and costs must be held to be penal, and no fee must be demanded or received except in cases expressly authorized by law."

109 Ala. 162,
3 Ala. App. 511, 192 Ala. 12.

The fees of sheriffs are provided for as follows:

Section 3741, Code of 1923, provides in part as follows:

"Sheriffs are entitled to the following fees and allowances in criminal cases * * * that is to say, for executing warrant of arrest in misdemeanor cases - - - $2.00; for executing warrant or writ of arrest in felony cases - - - - $4.00.

122 Ala. 394.

Vol. 5, Office Edition, p. 313, Opinion to Hon. J. E. Searcy, Clerk Circuit Court of Henry County, August 26, 1931.

Biennial Report of the Attorney General 1932-34, p. 381;
Biennial Report of the Attorney General 1930-32, p. 316.
Biennial Report of the Attorney General 1928-30, p. 447, 438.

"Question 8. The Sheriff having executed capias or warrant of arrest four times, would the Convict Department, under Section 3667, have to pay $4.00 in felony cases and $2.00 in misdemeanor cases for fee of sheriff for executing capias issued by the Clerk when the bond was declared insufficient and the defendant ordered rearrested by the Circuit Judge?"

The answer to your question numbered eight should be in the affirmative, based upon the same reason as is found in the answer to question numbered seven.

"Question 9. The Sheriff having executed capias or warrant of arrest four times, would the Convict Department, under Section 3667, have to pay $4.00 in felony cases and $2.00 in misdemeanor cases for fee of Sheriff for executing capias issued by the Clerk when the bond was forfeited due to the fact that the defendant failed to appear for trial?"

The answer to your ninth question must be answered in the affirmative for reasons stated in the answer to question seven.

"Question 10. The Sheriff having executed capias or warrant of arrest four times, would the Convict Department, under Section 3667, have to pay $4.00 in felony cases and $2.00 in misdemeanor cases for fee of Sheriff for executing capias issued by the Clerk when the bond was forfeited due to the fact that the defendant failed to surrender himself within fifteen days after his case was affirmed taking into consideration the fact that such capias was executed after the final determination of the case?"

The answer to your tenth question must be in the affirmative for the reasons set out in answer to question seven.

"Question 11. In the event your answer to either or all of questions 7, 8, 9 and 10 is in the negative would each fee, for executing capias or warrant of arrest, not paid by the Convict Department be a proper charge against the Fine and Forfeiture Fund, and upon the return of execution 'no property found,' under Section 4039, as amended by Acts 1927, p. 45?"

Since your eleventh question is predicated upon a negative answer to questions 7, 8, 9 and 10, I refer you to the answers to these questions.

"Question 12. The Sheriff having approved three bonds, would the Convict Department, under Section 3667, have to pay $1.00 for fee of Sheriff for approving the bond of $300.00 for the appearance of the

defendant to answer an indictment if one was returned by the Grand Jury?"

In my judgment, your twelfth question should be answered in the affirmative. Each approval of bond is a separate and distinct act, for which a fee authorized by Section 3741, Code of Alabama, 1923, in part as follows:

"For each bond or undertaking returned to court . . . . $1.00."

Section 3667, supra, provides in part as follows:

"Approving bond, one dollar."

In my judgment, these two statutes contemplate the payment of the fee for each separate act approving bond. The sheriff is required by law to approve the bonds set by the court and each new bond made required a separate act of approval, for which a separate fee is earned and which is charged against the defendant upon conviction as a part of the costs.

In misdemeanor cases or hard labor cases, the defendant may be sentenced for costs, unless he pays them presently or confesses judgment therefor with security. In felony cases the costs are chargeable to the defendent even though he may not be sentenced to pay them in labor.

Upon conviction these costs become a part of the costs included in the cost bill and the convict fund becomes liable therefor under Section 3667, supra, authorizing the payment.

The word "bond" as here used, in my judgment, means each and every bond approved. **Each** as used in the preceding clause contemplates separate arrests and attached thereto is the contemplation and approval of each bond. There appears no limiting word such as "once" as appears in connection with the provision for clerks fees in the first part of the statute, viz: "For issuing each capias or warrant (once)."

"Question 13. The Sheriff having approved three bonds, would the Convict Department, under Section 3667, have to pay $1.00 for fee of Sheriff for approving bond of $500.00 approved after the bond for $300.00 had been declared insufficient and defendant ordered rearrested by the Circuit Judge?"

In my judgment, your question numbered 13, should be answered in the affirmative for the reasons set out in answer to your question number twelve.

"Question 14. The Sheriff having approved three bonds, would the Convict Department, under Section 3667, have to pay $1.00 for fee of Sheriff for approving bond of $750.00 after the bond for $500.00 was forfeited by the failure of the defendant to appear for the first trial?"

In my judgment, the answer to question fourteen must be answered in the affirmative. See answers to questions numbered twelve and thirteen.

"Question 15. In the event your answer to either or all of questions 12, 13 and 14 are in the negative, would each fee, for approving bond not paid by the Convict Department be a proper charge against the Fine and Forfeiture Fund upon return of execution 'no property found,' under Section 4039, as amended by Act 1927, page 45?"

Your question numbered fifteen being predicated upon a negative answer to question 12, 13 and 14, the answers to the above questions obviates the necessity of answering the same.

"Question 16. The Sheriff having served five subpoenas on witnesses to appear before the Justice of the Peace on preliminary trial, would the Convict Department, under Section 3667, have to pay $2.50 for fee of Sheriff for serving such subpoenas, taking into consideration the fact that such subpoenas were served prior to an indictment and Section 3741, 'Serving each subpoena or notice . . . $ .50,' 122 Ala. 394 (25 So. 194), and 124 Ala. 102 (27 So. 215)?"

The answer to your sixteenth question must be in the affirmative. In my judgment, the sheriff is entitled to the fees provided for him as sheriff, regardless of the fact, that he may be performing services in a court of the Justice of the Peace, which services are ordinarily perfomed by a constable. Section 10199 of the Code of Alabama, 1923, provides as follows:

"May perform duties of constables; fees and liability. The sheriff is authorized to execute all mesne and final process which is required of constables, and shall receive the same fees and compensation therefor, and he and his sureties on his official bond shall be liable for any abuse of the process that he may execute under this section."

The sheriff's fees rendered in preliminary proceedings of a criminal case, however, have been declared by the courts not to be reduced by the operation of the above statute. In the case of Trapp, Pres. etc., vs. State ex rel Burgin, Sheriff, 122 Ala. 394, the Court held as follows:

"Sheriff; has right to execute warrant of arrest issued by justice of the peace; fees therefor;—Section 3741 of the Code of 1896, which authorizes the sheriffs to execute all mesne and final processes which are required of constables, and provides that he shall receive the same fees therefor, has no reference to the execution of warrants of arrest issued by a justice of the peace; since prior to the enactment of said section, the sheriff has full authority to execute said warrants. (Cr. Code of 1896, Section 5209), and for such service is entitled, under the statute, (Cr. Code of 1896 Section 4565) to a fee of two dollars."

124 Ala. 102, 27 So. 215.

Biennial Report of the Attorney General 1930-32, pps. 192, 965.

"Question 17. In the event your answer to question 16 is in the negative, would such fee be a proper charge against the Fine and Forfeiture Fund, upon return of execution 'no property found,' under Section 4039, as amended by Act 1927, page 45?"

Your seventeenth question being predicated upon a negative answer to question numbered sixteen, I refer you to the answer to question sixteen.

"Question 18. The Sheriff having committed the defendant to jail three times, would the Convict Department, under Section 3667, have to pay $1.00 for fee of Sheriff for committing him to jail on mittimus issued by Justice of the Peace?"

In my opinion, your question numbered eighteen should be answered in the affirmative. The fee here earnd by the sheriff is earned during the preliminary proceedings, but is not a part of the costs of the committing magistrate or the constable. (See 122 Ala. 394, quoted in answer to question sixteen). Such costs follow the case and are taxable upon conviction

as are other costs. I refer you to the case of Hawkins ex rel. F. B. O'Brien vs. the State, 124 Ala. 102 in which the court said:

> **"In all such cases, the costs arising on the preliminary trial before the justice, in case the defendant is bound over, follow the case into the court in which he is bound to appear, and is taxed at the end of the prosecution, and collected as the statute require. But, the statute nowhere authorizes costs growing out of prosecutions before a justice of the peace, when a defendant has been discharged, to be taxed against the fine and forfeiture fund."**

This fee is authorized by section 3741, Code 1923, under "guard fees" providing in part as follows:

> " * * * For guarding each prisoner lawfully committed to jail in the following cases: In all felony cases whether convicted or not $2.00
>
> In all arrests under indictment whether convicted or not $2.00
>
> In all other cases where convictions follow arrests ..... $2.00."

Of this amount, the convict Department pays only $1.00 as provided by section 3667, as follows: "for committing prisoners to jail, $1.00." Each separate committal of a prisoner earns a separate fee. Such fee being authorized by law, and the convict department being authorized to pay one dollar, it is my opinion that the legislature intended, that each act be paid for as provided by law.

I further refer you to Stone, Treas. vs. State, ex rel. Holcombe, 197 Ala. 293, in which the Court said:

> "While it must be recognized that there has been some confusion in the use of terms in the legislative dealing with the subject of fees and allowances to officers in criminal cases, yet it is clear from the whole that by the incorporation of the item for guarding prisoners in to Section 6638 **the Legislature intended that such items should be taxed against defendants upon conviction along with the other items therein named** for the collection of which **no specific different provision is made.** Otherwise the amendment of Section 6638 in the respect under consideration would come to naught. **Now section 6889 makes the fine and for feiture fund of the counties liable when the defendant has been convicted and there is a return of 'No property found.'"**
>
> Vol. 3, Office Edition, p. 93, Opinion to Hon. Hamp Draper, Associate Member, Board of Administration, Sept. 1, 1927.
>
> Vol. 2, Office Edition, p. 477, Opinion to Judge Chas. E. McCall, Chief Examiner of Accounts, July 11, 1924."
>
> Vol. 2, Office Edition, p. 653, Opinion to Mr. G. W. Miller, Clerk, Circuit Court of Coosa County, Rockford, Nov. 7, 1923.
>
> Vol. 3, Office Edition, p. 882, Opinion to Hon. Chas. E. McCall, Chief Examiner of Accounts, Oct. 16, 1924.
>
> "Question 19. The Sheriff having committed the defendant to jail three times, would the Convict Department, under Section 3667, have to pay $1.00 for fee of Sheriff for committing him to jail on capias issued by the Clerk when his bond was forfeited for his failure to appear for trial?"

In my opinion, the answer to your nineteenth question must be answered in the affirmative. In this instance, as in the answer to question numbered 18, the sheriff earns a separate fee for each act of guarding the prisoner lawfully committed to jail. The convict department pays one dollar as a guard fee or fee for committing the prisoner to jail. There is no limitation set upon the payment of this fee and in my judgment the legislature intended that the convict department pay half of the guard fee earned each time that such fee accrued.

See citations to Question 18.

"Question 20. The Sheriff having committed the defendant to jail three times, would the convict department, under Section 3667, have to pay $1.00 for fee of Sheriff for committing him to jail on capias issued by the Clerk when his bond was forfeited for his failure to surrender within fifteen days after his case was affirmed, taking into consideration the fact that he was committed to jail after the final determination of the case?"

See answer to Question 19.

"Question 21. In the event your answer to either or all questions 17, 19 and 20 is in the negative, would such fees, not paid by the Convict Department, be a proper charge against the defendant and payable out of the Fine and Forfeiture Fund, upon return of execution 'no property found,' under Section 4039, as amended by Act 1927, p. 45?"

In answer to your twenty-first question, I wish to advise that since questions 18, 19 and 20 are answered in the affirmative, I refer you to the answers to these questions.

"Question 22. Would the balance of $1.00 in each instance where the defendant was committed to jail, same not due to be paid by the Convict Department, under Section 3667, but earned by the Sheriff, under Section 3741, 'For guarding each prisoner lawfully committed to jail—in all arrests under indictment . . . $2.00', be a proper charge against the defendant and payable out of the Fine and Forfeiture Fund, upon return of execution 'no property found', under Section 4039, as amended by the Act 1927, page 45?"

In my opinion, the answer to your twenty-second question must be in the affirmative. The costs contemplated by this question are such as accrue in the process of the trial of the defendant and are taxed against him upon conviction, subject to the limitation that such debt for costs has not been discharged by the labor of the convict under sentence for the same. I refer you to the case of Stone, Treas. vs. State ex rel. Holcombe, 197 Ala. 293.

"Question 23. In the event the defendant has posted bond in the sum of $300.00, as set by the Justice of the Peace, immediately after the preliminary hearing, would it have been the duty of the Justice of the Peace to approve such bond, thereby charging the cost, under heading 'Justice and Constable, Preliminary Trial, by inserting Approve Bond . . . . . $ .50 and eliminate Mittimus . . . . $ .25, and under heading 'Sheriff's Fees' by eliminating Approve Bond one time . . . $1.00 and Commiting to Jail one time . . . $1.00?"

In my opinion, your question numbered 23 should be answered in the affirmative. Section 5238 Code of Alabama, 1923, provides as follows:

"5238. If probable cause shown, discharged on bail, or committed.—If it appears that an offense has been committed, and that there is probable cause to believe that the defendant is guiltly thereof, he must be discharged, if the offense is bailable, upon giving sufficient bail, but if sufficient bail is not given, or if the offense is not bailable, he must be committed to jail by an order in writing."

The defendant is under the jurisdiction of the Justice of the Peace, on the preliminary trial, until he is either discharged by the justice or bound over to await the action of the Grand Jury and committed to jail upon failure to offer sufficient bail as set by the magistrate upon the preliminary and the defendant immediately offers surety for such bond. The defendant is still under the jurisdiction of the magistrate until the bond is made. It would in my judgment, become the duty of the magistrate to approve such bond.

The sheriff has no jurisdiction of the defendant under these circumstances and therefore could not earn a fee. The Sheriff's jurisdiction of the defendant would not begin until the defendant had failed to make bond and was committed to jail.

"Question 24. Can the Sheriff in a felony case or misdemeanor case, in which the Justice of the Peace does not have final jurisdiction, release the defendant, prior to bringing him before the Justice of the Peace, on bond to appear before the Justice of the Peace on a certain date for a preliminary trial (63 Ala. 161)?"

Your question numbered 24 must be answered in the negative. In the case of Jones vs. State, 63 Ala. 161, the Court ruled on this question as follows:

"The sheriff or his deputy, on executing the warrant, could, if the defendant had requested, have taken bail for his appearance at the next term of the court having jurisdiction of the offense, to answer any indictment therefor found against him; or if the court was in session, for his appearance at such court—Code 1876, Section 4659. This is the only recognizance the sheriff had authority to take. Instead of exercising it, the sheriff discharged the defendant from custody, on a recognizance to appear before the justice on the day named. The recognizance was void, and should have been so pronounced by the Circuit Court, and the proceedings against the recognizers discharged."

See also 5 Cyc. 68, 84, 5 Cent. Dig. 2296, 34 A. L. R. 613, Case 624. See also Section 5222, Code of 1923.

"Question 25. In the event your answer to question 24 is in the affirmative, would the Sheriff earn a fee of $1.00 for approving such bond and would same be payable by the Convict Department, under Section 3667, upon receiving the defendant in the penitentiary?"

In answer to your question numbered twenty-five, I refer you to the answer to question twenty-four.

"Question 26. If the preliminary trial is adjourned as per section 5227 and the defendant is released on bond, is it the duty of the Sheriff or the duty of the Justice of the Peace to approve such bond?"

In my opinion, it is the duty of the magistrate to approve the bond named in your question numbered twenty-six, for the reasons set out in answer to question number twenty-three.

"Question 27. If it is the duty of the Sheriff to approve bond referred to in question 26, would the Sheriff earn a fee of $1.00 and would same be payable by the Convict Department, under Section 3667, upon receiving the defendant in the penitentiary?"

Your question twenty-seven, being predicated upon the answer to twenty-six, I refer you to said answer to question twenty-six.

"Question 28. If it is the duty of the Justice of the Peace to approve bond referred to in question 26, would the Justice of the Peace earn a fee of $.50 and would same be payable by the Convict Department, under Section 3667, upon receiving the defendant in the penitentiary?"

In my judgment, question numbered twenty-eight, must be answered in the affirmative. Such fee is a part of the cost of the preliminary, and is included in the amount allowed or paid by the Convict Department, under Section 3667, supra, as follows:

" * * * cost of committing magistrate and constables on preliminary trial, both together not to exceed five dollars; court stenographer's fee not to exceed three dollars; and when the conviction is secured by a solicitor other than a solicitor who is paid a salary by the state, or when the solicitor is paid a salary by the county, such bill of costs shall also include the solicitor's fee, which is now or may be allowed by law."

The costs on the preliminary follow the case and are payable on conviction.

See case of Hawkins ex rel. F. B. O'Brien, vs. State, supra.

While this is not a late case, the rules laid down here are applicable to the law as it stands at present, and I do not find that it has been superseded or overruled.

"Question 29. A defendant is indicted for a felony and is arrested by the Sheriff on capias or warrant of arrest for such felony but on the trial of the case he is convicted of a misdemeanor, would the fee for executing such capias or writ of arrest be $4.00 or $2.00?"

The answer to this question requires that a determination be made of when the fee attached. At the time the services are performed the defendant is charged with a felony and is indicted for a felony, but because of evidence or circumstances growing out of the trial of the defendant, he is finally convicted of a misdemeanor. In my opinion, the fees attach at the time the service is performed and become a liability in the amounts allowed by law for such services chargeable to the defendant upon conviction. It is therefore my opinion that the fee for executing the writ of arrest or capias charging a felony would be $4.00 as provided by law.

Biennial Report of the Attorney General 1932-34, page 381.

"Question 30. In the event your answer to question 29 is $4.00 would the Convict Department, under Section 3667, have to pay $4.00 upon receiving the defendant in the penitentiary?"

In my opinion, the answer to your question numbered thirty should be in the affirmative. Section 3667, supra, provides in part as follows:

"Sheriff's fee for executing each warrant or writ of arrest .....$4.00."

The language here is unequivocal and specifically authorizes the payment of the fee from the convict fund.

"Question 31. A defendant is indicted for assault with intent to murder, a weapon being used, but is convicted of assault, would the Solicitor's fee be $10.00 or $15.00 (48 Ala. 421)?"

In answer to question numbered thirty-one, I wish to advise that, from the wording of your question, I am not sure whether or not the defendant is convicted of assault where a stick or other weapon is used.

If the defendant is convicted of assault, a weapon being used, the solicitor's fee in the case should be fifteen dollars. I refer you to the case of Adams vs. the State, 48 Ala. 421, in which the court held as follows:

"1. Solicitor's fee; when properly allowed, as for a conviction of assault with weapon.—If a party is indicted for an assault with intent to murder, with a pistol, knife or other weapon, and puts in a plea of guilty of a simple assault, his plea is an admission of charge as made, denying only the intent. In such a case, the solicitor's fee is fifteen dollars."

It will be noted that in the case cited in your question, the defendant plead guilty to the charge, such plea the court held to be an admission of the charge as made, but denied only the intent. In a case of this kind the defendant then is convicted for assault where a weapon is used.

The Code of 1923, Section 3738, providing for solicitors' fees, provides in part as follows:

"for each conviction of an assault, assault and battery, or affray, where a stick or other weapon is used, $15.00. (Emphasis supplied).

In my judgment the Code Section cited above provides a fee of fifteen dollars for the solicitor only if and when the defendant is convicted of any of the offenses named therein, **and a stick or other weapon being used.**

If the defendant does not plead guilty, a question of fact arises, and it becomes necessary to prove that a stick or other weapon was used, if the solicitor's fee is to be fifteen dollars. If the defendant is not convicted of the charge of assault, etc., as provided in Section 5738, supra, where a stick or other weapon is used, then in my judgment the following provision of the same Code Section supra applies:

"For each conviction of a misdemeanor, not otherwise provided for ..... $10.00."

If the defendant is convicted of simple assault, it becomes a "conviction of a misdemeanor not otherwise provided for", and the fee would be ten dollars.

I wish to further call your attention to the following citations which are pertinent to the questions indicated by the number in the margin.

1. Office Edition, Vol. 5, p. 313, Opinion to Hon. J. E. Searcy, Clerk Circuit Court of Henry Co., August 26, 1931.

   Office Edition, Vol. 4, p. 242, Opinion to Hon. E. L. McConnell, Clerk, Circuit Court of Lauderdale County, June 10, 1931.

   Office Edition, Vol. 6, p. 176, opinion to Hon. W. F. Feagin, Director, Board of Administration, August 2, 1931.

Office Edition, Vol. 7, p. 185, Opinion to Hon. John H. Daniel, Clerk. Circuit Court of Pickens County, December 23, 1931.

Office Edition, Vol. 19, p. 208, Opinion to Clerk of the Circuit Court, Henry County, Sept. 25, 1930.

Biennial Report of Attorney General 1928-30, p. 194.

4. Office Edition, Vol. 7, p. 302, Opinion to the Chief Examiner of Accounts, Sept. 28, 1928.

Biennial Report of Attorney General 1924-26, pp. 313, 336.

Office Edition, Vol. 3, p. 112, Opinion to Hon. Roy Sanderson, March 20, 1931.

Office Edition, Vol. 6, p. 89, Opinion to Hon. J. C. Coleman, Clerk, Circuit Court of Greene County, Sept. 15, 1931.

Biennial Report of Attorney General, 1930-32, p. 965.

Office Edition, Book 1-A, p. 25, Opinion to Hon. J. H. Hard, Comptroller, Oct. 15, 1934.

Office Edition, Book 1-A, p. 92, Opinion to Hon. S. M. Cobb, Clerk Circuit Court of Wilcox County, December 12, 1934.

Office Edition, Book 5-A, p. 293, Opinion to Hon. F. B. Carpenter, Clerk, Circuit Court of Clay County, July 31, 1935.

7. Biennial Report of Attorney General 1928-1930, p. 447 12, 13, and 14.

Biennial Report of Attorney General 1928-1930, p. 194.

16. Biennial Report of Attorney General 1928-1930, p. 551.

18. Office Edition, Book 6-A, p. 93, Opinion to Hon. Chas. W. Lee, Comptroller, Sept. 4, 1935.

State vs. Holcombe, 197, Ala. 293.

Hawkins v. State, 124 Ala. 105.

Biennial Report of Attorney General 1930-1932, p. 329.

Office Edition, Book 14, p. 48, Opinion rendered to Hon. J. F. Lee,

Sheriff Greene County, March 28, 1933.

22. Biennial Report of Attorney General 1928-1930, p. 194.

29. Biennial Report of Attorney General 1932-1934, p. 264, Office Edition, Book 19, p. 53, Opinion to Sheriff, Elba, Coffee County, Sept. 3, 1930.

Office Edition, Book 5-A, Office Edition, p. 72, Opinion to Ralph L. Jones, rendered July 9, 1935.

All former opinions of this office in conflict herewith are hereby modified to conform to this opinion.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 8, 1936

Hon. D. B. Borden,
Judge of Probate, Hale County,
Greensboro, Alabama.

Counties—County Financial Control Act.

Where debt for courthouse building was contracted for prior to the adoption of the County Financial Control Act, Act No. 379, approved Sept. 9, 1935, the same may be refunded and is authorized by the provisions of said Act.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of January 23, 1936, in which you request my opinion as follows:

"Hale County during the fiscal year ending October 1, 1935, had borrowed $10,000.00 to assist in payment of its new Courthouse. Subsequent to October 1st they borrowed $6,000.00. We are very anxious to know whether, under the new Budget Law, these two amounts can be renewed. We would like, if possible, to extend the entire $16,000.00 over a period of years. We have been advised that any debts or warrants issued subsequent to October 1st cannot be renewed. However, as this loan was made for the payment of an indebtedness already contracted prior to October 1st, don't you think that it is possible to renew that part of the loan amounting to $6,000.00, as well as the $10,000 contracted prior to October 1st.

"I will appreciate an opinion from you relative to this as early as possible."

The County Financial Control Act to which you refer limits the time and authority of the County Board "to incur obligations and to approve and pay claims for current operating expenses in any fiscal year to the income of such year available for such purposes.

It also authorizes "the refunding of outstanding general obligations".

From your statement, apparently the obligation for the building of the courthouse had been incurred prior to the effective date of this Act. If this is true, it is not affected by that part of the Act which limits the "incurring" of obligations. Further the expendiure was for an investment and was not for current expenses.

On the contrary, it was an outstanding obligation and was apparently contemplated as being of the class that may be refunded by the specific provisions of the Act.

The fact that a temporary loan has been secured to take care of this obligation merely changes the form of the oblgiation and does not prevent its being a general obligation.

I am therefore of the opinion that the entire $16,000.00 may be refunded in accordance with the provisions of the Act.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 10, 1936.

Hon. M. F. Elrod, Chairman,
Board of Revenue, Marshall County,
Guntersville, Alabama.

1. There is no authority of law for paying ferriage of a member of the Board of Revenue or Commissioners Court incurred while going to and returning from the meetings of said Board.

2. Neither the expenses nor the per diem of members of the Commissioners Court or Boards of Revenue can be paid out of what is known as the Gasoline Fund.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of January 15, 1936, in which you request my opinion as follows:

"1. Can the members of the Board of Revenue or Commissioners Court be paid ferriage for going and returning from meetings of said Board of Revenue.

"2. Can this be paid out of the Gasoline Fund?"

Answering your first request, I find no authority of law for paying ferriage for a member of Court of County Commissioners or Board of Revenue while going to and returning home from meetings of such Board. I call your attention to Section 6771, Code of Alabama, 1923, as amended by an Act approved July 31, 1931, General Acts 1931, page 805, which is in part as follows:

"Section 1. That Section 6771 of the Code of 1923 be and the same is hereby amended to read as follows: Each member of the Court of county commissioners and board of revenues in each of the several counties of the State of Alabama shall be paid out of the treasury of their respective counties for their services the sum of three dollars per day while occupied in the discharge of their duties as such members of the court of county commissioners or board of revenue, and five cents per mile in going to and returning from their respective courts."

My answer to your second inquiry is in the negative. I call your attention to the case of Weaver, et al v. Tidwell, County Treasurer, 228 Ala. 169. In this case, the very question you have here was decided and the court held that such payment could not be made from the Gasoline Fund.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 10, 1936.

Dr. A. H. Collins,
Commissioner of Public Welfare,
State Capitol,
Montgomery, Alabama.

Public Welfare Department—

1. Applicant for Old Age Pension held not to lose required residence in Alabama by temporary absence from State.

2. State held to pay one-half and Federal Government held to pay one-half of Old Age Pension when pensioner does not have required twelve months' residence to constitute "legal settlement" in county.

3. The word "family" held to mean closely related members of household within the meaning of S. B. 397—Simpson.

4. Persons living in Almshouses not precluded from filing application for Old Age Assistance.

5. Applicant for Old Age Assistance charged with crime but not convicted held not ineligible for Old Age Assistance.

6. Applicant unable to find employment after bona fide effort to find same for support of family held to have just cause for failure to furnish such support.

7. (a) Confederate Veterans or their widows may make application for Old Age Assistance.

(b) State to pay three-fourths of maximum pension of fifty dollars ($50.00) for Confederate Veterans.

8. County governing body held authorized to approve applications for Old Age Assistance.

9. County governing body required to notify applicant of action on application within five days after such action is taken.

10. County Director required to submit applications which are disapproved to county governing body for its confirmation.

11. State Board may appoint staff members from State Department to act as court of appeals only when such staff members are members of the Board.

12. (a) In cases of appeal to State Department by applicant for pension, State Department may increase the amount of said pension.

(b) County Department required to pay one-fourth the total pension the State Department approves in case of appeal.

13. State Department shall review all disallowances and all awards made by county governing body in cases where appeal is taken.

14. State Department may increase or decrease amount of pension approved by county governing body as in its opinion is justifiable.

15. County governing body authorized to increase or decrease amount of pension at the beginning of any annual appropriation for Old Age Assistance.

16. (a) & (b) County governing body may increase or decrease amount of pension at any time, subject to the provisions of Section 10 and 19 of S. B. 397—Simpson.

17. State Department authorized to require county governing body to keep records of disbursements and receipts for Old Age Pensions in the manner described by the State Department.

18. State Department not authorized to limit duties to be exacted of County Director by county governing body.

19. State Department authorized to set up rules and regulations not in conflict with S. B. 397—Simpson and S. B. 365—Walton.

20. Old Age Pensions held to be prior claim against Confederate Veterans Fund after Confederate pensions are paid in full.

21. Confederate Veterans held to be eligible for Old Age Pensions when properly qualified under the terms of S. B. 397—Simpson.

22. In event of a surplus or deficiency of State funds to be apportioned to counties, State Department must make apportionment as provided for by Section 16 of S. B. 397—Simpson.

23. Apportionment of funds alloted to the State by Federal Government provided for by Section 18 of S. B. 397—Simpson.

24. State Department held required to pay three-fourths of necessary pension in case of hospitalization regardless of maximum thirty dollars ($30.00) set for Old Age Pension.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of December 28, 1935 in which you request my opinion. I have, also, your letter of January 24, 1936 supplementing your request as follows:

"On December 28, 1935, I transmitted to you a list of twenty-five questions pertaining to different phases of the Alabama Old Age Assistance Act.

"I wish to withdraw my request for an opinion on Question No. 25 for the present time."

For purposes of convenience, I have set out the first twenty-four questions of your original request and the answers thereto as follows:

1. Section III, subsection (c). In the event an applicant has been out of Alabama for 3 to 12 months on a so-called visit, would he have to return to Alabama and live 12 months addition in order to be eligible?

1. Senate Bill 397—Simpson, Section III, subsection (c) provides, as one condition of eligibility, that the applicant

"Has resided in the state for at least one year immediately preceding the date of the application."

You will note that the above quoted section required one year's residence in the state immediately preceding date of application.

The answer to your first question must turn, first, upon the legislative intent, and, secondly, upon the particular facts in each case. In my opinion, since the legislature did not see fit to define the term "residence" or the phrase "has resided" in any especial sense peculiar to this act, that the general and accepted legal definitions of these words, applicable to citizenship, would apply. It is a generally accepted fact that the word "residence" may have a double meaning; namely, a temporary place of abode unaccompanied by any intention to make it permanent, or it may be synonymous with the word "domicile" which would indicate a fixed purpose of making a permanent home to which the individual, while absent, would consistently maintian the animus revertendi necessary to maintain his legal residence and

domicile in that place. (I refer you to an opinion of this office rendered to Hon. C. B. Rutherford, Chairman of the Board of Registrars of Russell County, rendered on January 29, 1936.) In my judgment, the word "residence" as used in this statute contemplates citizenship in Alabama since the benefits are primarily intended to be bestowed upon citizens of this state. In the event the applicant has been out of Alabama for three to twelve months on a so-called visit, in my judgment, the question of whether or not he would have to return to Alabama and live twelve months additional in order to be eligible for old age assistance must turn upon whether or not he has lost his legal residence in Alabama by removal, with no intention of returning to Alabama as his permanent home. See opinion to Hon. C. B. Rutherford cited above and authorities cited therein. See, also, opinion to Mrs. Jessie Nunnelee, Chairman of Board of Registrars of Montgomery County, Alabama, of date of January 6th, 1936 copy of which is enclosed for your convenience.

2. Section III, subsection (d). "Any person otherwise qualified . . . . . who has no legal settlement . . . . shall file application in the county in which he is residing and his assistance . . . shall be paid entirely from State funds . . . " Does this mean that the State shall pay for ½ the pension (state and county's share) with Federal government paying ½, or that the State shall pay the whole amount of pension?

2. The answer to this question requires a consideration of legislative intent as found in the language of the act. In my opinion, the legislature passed this act in contemplation of cooperation with Federal authorities in the furtherance of a public policy of caring for aged, needy persons in the manner prescribed by the provisions of the Federal Social Security Act governing old age pensions. In my judgement, the provisions of S. B. 5397 - Simpson contemplates that the "State Funds" shall compose appropriations made by the legislature to match Federal funds, and the Federal funds granted to the state. It is, therefore, my opinion that the legislature intended that one-half (1-2) of the payment here mentioned be Federal funds.

3. Section III (e). "Nor shall any pension and pensions to any family exceed $360.00 annually". Does this mean that regardless of whether one or six eligible persons live in one family only $360.00 in pensions could be granted?

In this subsection should not a family be interpreted to mean related household?

3. In my opinion, this provision contemplated only the related members of a household and members of the "family". The ordinary meaning of the word family as defined in Webster's International Dictionary means "a group of persons consisting of parents and children". The use of the word family in this statute is intended to be in the ordinary sense of the word indicating a single household closely related by blood or marriage. It is, therefore, my opinion that in contemplation of the ordinary use of the word family, the legislature intended that a single closely related household could not receive more than $360.00 annually. In my judgment, a group of people closely related by blood or marriage could be considered as one family for the purposes of this act. The word "family" has been judicially defined as follows:

> " 'Family' within the statute imposing liability for articles going to the support of families held to include wife as well as children."
>
> "Although, in the broadest aspect, 'family' means a group of kindred persons within the meaning of the principle that services of persons in

family relationship are presumed to be gratuitous, **a 'family' is a collective body of persons forming one household** under one head and domestic government having reciprocal natural and moral duties to care for one another."

"Duty of town to support **family of resident pauper includes only those persons whom head of family is bound by law to support.**"

4. Section III (h) & XIX. Is it within the law to make applications on persons living in an almshouse in order to place them in a family on Old Age Assistance?

4. In my opinion, it is within the law to take applications of persons living in almshouses. Section 3 of the above quoted act provides that:

"Old age pensions shall be payable under this Act to any person who shall comply with the requirements of this Act. : : : :"

and subsection (h) of Section 3 further provides that the pension can not be paid to a person who is receiving benefits as an inmate of any public institution, it being the apparent legislative intent that no person should receive double benefits from public funds. Section XIX of the Act provides, however, that:

"Nothing in this Act contained shall be construed as prohibiting any person now an inmate of a public institution from applying for a pension hereunder."

A person may be eligible for an old age pension in all respects other than that he is already a public charge and in such event could be removed from the almshouse and receive an old age pension after such removal but not before-- his application having been approved while still an inmate of a public institution.

5. Section III (i). Would an applicant be ineligible if during the year preceding date of application he had been in jail but was not later convicted of the charge on which he was indicted?

5. The answer to this question must necessarily turn upon a definition of the word "inmate" and the legislative intent as to the use of this word in the above quoted act. Webster's International Dictionary defines "inmate" as being "one confined or kept in an institution such as an asylum, prison, or poorhouse." I do not find that the courts have judicially determined the meaning of the phrase "inmate of prison" with reference to the cause of committment or guilt or innocence of the party incarcerated. It would appear that a natural construction of the section involved, leads to the conclusion that a party is an "inmate of a prison or jail" when he is rightfully there on committment of a court of lawful jurisdiction.

In my judgment, therefore, an applicant would not be eligible if during the year preceding the date of application he had been in jail but was not later convicted of the charge on which he was indicted.

6. Section III (j). If an applicant were unable to find employment, would that be "just cause" for failure to support spouse or children?

6. The answer to your sixth question depends upon the particular facts involved. In my judgment, the answer to this question must turn upon the question of whether or not the husband has willfully neglected or refused to support his family. In the case of St. John v. State, 22 Ala. App. 115, 113 So.

321, the court discussed the question of the husband's wilful neglect or refusal to support his family in the following language:

> "Where there is a bona fide offer by the husband to support the wife and an effort so to do, the ablity of the husband in this connection becomes a proper inquiry; that is to say, his income or financial ability should be taken in consideration for the purpose of ascertaining whether such offer is reasonable and made in good faith, or whether it is unreasonable and made for the purpose of avoiding a criminal prosecution. The result of such inquiry should control. The statute is highly penal and involves the intent of the accused . It is not a substitute for an action of divorce, and it was not designed to settle marital controversies nor to furnish relief for violations of marital obligations, except in the sole particular of requiring a husband to support or maintain his wife. The specific charge is a wilful neglect or refusal, or the failure to provide for the support and maintenance of his wife, provided he is in destitute or necessitous circumstances. No other offense is involved, and the law does not authorize or contemplate that the wife impose the conditions; in other words, a husband cannot be made a disorderly person or a criminal and be held amenable to this statute by not complying with any conditions in respect to support or maintenance which the wife may see fit to impose. We are of the opinion that the support which this statute was intended to secure is the necessities of life such as the parties have been accustomed to, and such as the husband is able to provide."

In my judgement, the question then becomes one of fact to be proven to the satisfaction of the welfare authorities. If a bona fide effort to secure employment with which to support his family be shown, in my opinion, the failure to support based upon this fact alone would not disqualify an applicant for Old-Age assistance under the terms of S. B. 397 - Simpson, supra.

> 7. (a) Section IV, XVII & XIX. If confederate veterans or their widows desire, may they make application for Old Age Assistance?
>
> (b) What part of maximum pension of $50.00 per month for confederate veterans, after $15.00 from Federal Government is deducted, will be paid by State? What part by county?

7. (a) In my opinion, if the confederate veterans or their widows desire, they may make application for old age assistance. Sections 4 and 17 contemplate such pensions:

> "Section 4. . . . . The amount of each pension shall not be more than $30.00 monthly, except that in the case of any person who served in and was honorably discharged from the armed forces of the United States or of the Confederate States of America in the War Between the States, the amount of each pension shall not exceed $50.00 monthly."
>
> "Section 17. Any person entitled to any pension under Article 1 of Chapter 55 of the Code of Alabama of 1923, as amended, (Confederate Pensions) who may also be entitled to an old age pension under the terms of this Act, shall be required to make application for a pension as herein provided. Any pension actually received by any such person under the terms of this act shall be deducted from pension due such person under the provisions of said Article 1 of Chapter 55, of the Code of Alabama of 1923, as amended, (Confederate Pensions)".

(b) In answer to your question as to the portion of the maximum pension for confederate veterans to be borne by the State and county respectively, I

call your attention to Section 16 of S. B. 397 - Simpson part of which provides as follows:

> "The State of Alabama shall quarterly, upon requisition of the State Department, pay each county a sum in money equivalent to three-fourths of the amount estimated to be expended by the county during the ensuing three months for relief for **each old age pensioner** who has been granted relief under the provisions of this Act, increased or decreased, as the case may be, by any sum which for any prior quarter was greater or less than three-fourths of the amount actually expended by the County under the provisions of this Act."

The logical construction of this section leads to the conclusion that three fourths of each pension granted is to be paid by the State while one-fourth will be paid by the county governing body.

8. Section VI. Will it be legal for county governing body to sign Form DPW-10 (attached) to fulfill Section VI?

8. Form DPW-10 is as follows:

STATE OF ALABAMA
DEPARTMENT OF PUBLIC WELFARE
APPLICATION FOR OLD AGE ASSISTANCE

STATE OF ALABAMA
Department of Public Welfare

Application No.....
Date Received.....
Received by.....

COUNTY.....
I. (1) Name..... (2) Address.....
(Surname) (First) (Middle)
..... (3) P. O. Address .....
.....
II. (1) Date of birth..... (2) Place of birth.....
Month Day Year
..... (3) Race.....
(4) If foreign born, are you an American citizen.....
(5) When were you naturalized.....
.....
III. Marital Status (check which): (1) Married ( ), (2) Single ( ), (3) Widow ( ), (4) Widower ( ), (5) Divorced ( ), (6) Separated ( ), (7) If widowed, how long..... (8) If divorced, when..... (9) If married, give following information regarding spouse:

Name	Address	Age	Date Married	Place

IV. (1) Have you ever been imprisoned for a felony.....
(2) If so, when..... (3) Where.....
.....

V. Place of residence for past ten years:

City and County	From	To
1.		
2.		
3.		

4.....
5.....
6.....
7.....
8.....
9.....
10.....

VI. (1) General state of health.....
(2) Are you deaf..... (3) Blind..... (4) Crippled.....
(5) Otherwise incapacitated..... (6) Give nature and extent of incapacitation.....
(7) Illnesses during past year.....
(8) Was hospitalization necessary .....
(9) Name of hospital.....
(10) Name of attending physician.....
(11) Address.....
(12) History (if any) of care of mental illness.....

VIII. List all living parents, brothers, sisters, children and grandchildren over 21:

Name	Address	Age	Kinship	Marital Status	Number of Dependent Children

---

VII. (1) Do you or spouse own any property.....
(2) If so, give following information:

Real Estate	Value	Is it Assessed for Taxation	Mortgage or Indebtedness

By whom held or to whom owing:
.....
.....

(3) Do you have any bank accounts..... (4) Total Amount $..... (5) Name of Banks.....
..... (6) Personal Property:
(7) Kind.....
(8) Value $..... (9) Insurance: List of all policies of applicant and spouse:

Policy Holder	Company	Kind	Number of Policy	Value of Policy

Premium To Whom is Policy Payable
.....
Amount, Period, By Whom Paid
.....
.....

(10) Indebtedness: (Other than above stated):
(11) Total $.....
(12) For what incurred.....

(13) To whom owing.....

(14) List of any property disposed of in last five years by applicant or spouse:

Property Sold	Date of Sale	Amount Realized from Sale

(15) Pension or other compensation: (16) U. S. Government Pension, $.....per month; (17) Confederate Pension $..... per month; (18) Other Pension (specify) ..... $.....per month. (19) Is applicant a war veteran .....?....., (20) widow of a war veteran....., (21) Parent of a war veteran.....

(22) If so, names of such veterans.....

IX. OCCUPATION: (1) Usual in past.....
Give type of work and kind
..... (2) When last so employed.....
of industry
(3) At what work most regularly employed during past year.....
..... (4) By whom so employed..... (5) Address.....
(6) Has past year's work been regular ( ), (7) Irregular ( ), (8) Full Time ( ) (9) Part time ( ), (Indicate which).
(10) Total earnings past year $..... (11) Is employment likely to continue..... Probable earnings coming year $.....
.....

I am fully informed of the contents of this application and know that making false statements or misrepresentations on my part or on the part of others to support my application constitutes a violation of the law with penalties fixed therefor.

DATE....., 19..... .....
Signature of Applicant.

X. VERIFICATION: How were following confirmed?

(1) Birth date -- item II. (1).....
(2) Birth place - item II. (2).....
(3) Citizenship - item II (4)-(5).....
(4) Residence - item V.....
(5) Marital status - item III (1)-(9).....
(6) Prison Record - item IV (1)-(3).....
(7) Health - item VI (1)-(12).....
(8) Previous assistance - item XIV.....
(9) Employment - item IX (1)-(12).....
(10) Relatives unable to assist - item VII & XI.....

No.	Reason
.....	.....
.....	.....
.....	.....

(11) Financial Data: item VIII (1)-(22)
Property .....
Bank Accounts .....
Insurance .....

Pensions .....
Indebtedness .....

XI. Members of Household (Relatives and others)

	Name	Address	Kinship	Age
1.				
2.				
3.				
4.				
5.				

XII. (1) Year applicant last voted.....
(2) Election precinct.....
(3) Box No.....
(4) Has spouse made application.....
(5) Are present living arrangements suitable.....
(6) Proposed living arrangements.....

XIII. (1) APPROXIMATION OF MONTHLY EXPENDITURES:

	(A) Usual During Past Year	(B) Estimate for Ensuing Year
Rent	$	$
Food		
Fuel		
Light		
Board		
Clothing		
Insurance		
Taxes		
Interest		
Property		
Upkeep		
Property Payments		
Indebtedness		
Medical care		
Incidentals		
Total	$	$
Total of XIII-2 B		$
Amount of old age assistance needed		$

(2) SOURCE AND APPROXIMATE AMOUNT OF MONTHLY INCOME:

	During Past Year	Estimated for Ensuing Year
Wages	$	$
Property Income		
Children		
Spouse		
Other relatives		
Friends		
Church Fraternal Organizations		
Public Relief (County state or federal)		
Total	$	$

XIV. Record of previous assistance: (Organizations, churches or friends giving assistance in the past year.)

Names	Addresses	Kind of Service	Amount of Relief	If application is granted, will Service Continue.
1.				
2.				
3.				
4.				
5.				

XV. Conclusion of worker making investigation:

(1) Is applicant eligible?.....
(2) Needs: Amount $..... per month
(3) Method of payment.....
(4) Service needs.....
(5) If ineligible, give reasons:

Signature of worker.....
Date....., 19.....

XVI. DECISION OF COUNTY DEPARTMENT OF PUBLIC WELFARE:

(1) Old age assistance denied for following reasons.....
.....

(2) Old age assistance granted to the amount of $..... per month (3) Beginning.....
....., 19..... (4) To be paid.....
.....
manner of payment

(5) Was property required to be transferred to the county?.....
(6) Service to be rendered (if possible) by.....
(7) Remarks.....
(8) Approved by county governing body.....
Date
....., 193.....

XVII. (1) Written notice of decision sent ....., 19.....
Date

(2) Copy of report sent to State Department of Public Welfare.....
....., 19.....
Date

Signed.....
Director of Public Welfare.

County.....

You ask if the county governing body may legally **sign** Form DPW-10 quoted supra. In reply, I wish to advise that I find no set place for the county governing body to sign this form which is the application for old-age assistance. I do find that a blank for the date of approval by the county governing body is provided, and I therefore assume that you mean to inquire

concerning the authority of the county governing body to approve this application form.

In my opinion, the county governing body has sufficient authority to approve or disapprove applications for old-age assistance, conferred by Section VI of the Act in question. I find no features of the application quoted supra, that, in my opinion, violate any of the provisions of S. B. 397 - Simpson. Section 5 of the above referred to Senate Bill confers sufficient authority for the questions contained in the application.

9. Section VI. Is it necessary for county governing body to notify applicant of its approval of application before State Department of Public Welfare gives its approval?

9. Section VI provides that:

> "Notice of the action taken by the county governing body on an application (for old-age pension) shall be given the applicant in writing by registered letter, return receipt requested, mailed to him at the address given on his application."

Section VI, supra, provides in part as follows:

> "Said letter of notice shall be mailed to the applicant not more than five days after the county governing body shall have taken action."

Accordingly, the State Department may give its approval at any time before or after notice is given to the applicant, but such notice **must** be given by the County Department within five days from date of action on the application.

10. Section V & VI. Is it necessary for County Director to submit applications which she disapproves to county governing body for its confirmation of her decision?

10. It is necessary for the County Director to submit applications which are disapproved to the county governing body for its confirmation. I call your attention to Section 5 which provides in part as follows:

> "The County Director shall certify his finding and recommended award in each case to the county governing body which shall within thirty days thereafter, upon such additional investigation or hearing, if any, as it deems necessary, either approve, disapprove, or amend such finding or recommend award."

11. Section VII. May State Board appoint staff members of State Department to act as court of appeals?

11. Section VII provides in part as follows:

> "In the review of any disallowance or an application or of an award or modification thereof, the State Department may act through its Board or through any three members thereof designated by its chairman or other presiding officer."

It will be seen that the State Board may appoint staff members of the State Department to act as a court of appeals only when such "staff members" are **members of the Board.**

12. Section VII. In instances where an appeal from applicant is taken to State Department, may the State Department increase amount of pension?

Is it mandatory that the county governing body pay ¼ of the total pension the State Department approves in cases of appeal by applicant?

12. Section VIII provides that:

"No decision of the State Department shall increase the award made by a County governing body except in a case where under the provisions of Section 7 hereof the applicant has demanded a review of the award."

Pertinent parts of Section VII provides as follows:

"(a) In the event an application is denied or the amount or terms of award or any modification thereof be deemed inadequate or unjust by the applicant, the applicant affected may demand a review of his case before the State Department by filing his written request for such review with such county governing body not more than sixty days after notice of its action, such governing body shall thereupon certify its records and data on the case, including the records of the County Department, and such additional information as it deems relevant, to the State Department, which Department shall promptly grant a hearing upon such application".

"(b) At this hearing any party at interest may appear and present any relevant facts. The State Department shall make such additional investigation as it may deem necessary and shall certify its finding and award on the case back to the county governing body concerned and **such finding and award shall thereupon become final and effective as of such date as the State Department shall fix."**

Premises considered, where an appeal by an applicant is taken to the State Department, this department may increase the amount of pension and such finding and award shall be final as provided by Section VII and VIII, supra, and it is mandatory that the county governing body pay one fourth of the amount approved by the State Department.

13. Section VIII. Is State Department to review all disallowances as made by county governing body but not necessarily the applications disapproved by the County Director?

13. The thirteenth inquiry should be answered in the negative. Section VII of the above named act provides that:

". . . the applicant affected may demand a review of his case before the State Department. . . . . ."
Section VII provides in part that:

"It shall be the duty of the State Department to review all disallowances of applications and all awards and modifications of awards made by the county governing body of each county."

14. Section VIII May State Department, after review of applications presented by county governing body, decrease but not increase the amount of pension approved by county governing body?

14. Section VIII provides in part as follows:

"The State Department may at any time upon its own motion, after notice to the applicant and to the county governing body and due opportunity for a hearing, make such decision as to the granting of

any pension and the amount and terms thereof as in its opinion is justified. . . . ."

Accordingly, the State Department after review of applications presented by the county governing body, may in my judgement, increase or decrease the amount approved by such county governing body.

15. Section IX. May the county governing body upon recommendation of County Director increase or decrease amount of pension at beginning of each annual appropriation for Old Age Assistance?

15. Subject to the appeal and review provided for in Sections 7 and 8, the county governing body is given the authority by Section 9 upon the recommendation of the County Director to increase or decrease the amount of the pension at the beginning of any annual appropriation for old age assistance.

16. (a) Section X. May county governing body, after investigation by County Director, decrease amount of pension at any time?

(b) May county governing body increase amount of pension if at any time it seems necessary to welfare and health of applicant?

16. (a) Your sixteenth inquiry depends upon a construction of Section 10. This section provides:

> "If at any time the recipient of an old age pension, or the husband or wife of such recipient, shall become possessed of any property or income in excess of that owned or being received at the date of the application or if at any time any relative of the recipient responsible in law for his support, becomes able to support the recipient, in whole or in part, it shall be the duty of the recipient immediately to notify the County governing body in writing of the facts in the case. The County governing body upon such notification or upon otherwise learning the facts, shall, after investigation, continue, reduce or cancel the amount of the pension as the facts may warrant. Its action in this respect shall be subject to appeal and review as provided in Sections 7 and 8 above."

It is to be seen from this section that the county governing body may decrease the amount of the pension at such times as provided by such section.

(b) The county governing body may increase the amount of pension necessary to the welfare and health of the applicant only in those instances set out in Section 19 which in substance is as follows:

> "In the event an applicant for a pension hereunder is so physically incapacitated that it is necessary for him to be hospitalized, the county is authorized to make such arrangements as are necessary to secure hospitalization, even though the amount to be expended exceeds the maximum pensions allowable to the applicant hereunder, but the amount to be reimbursed the county by the State shall be computed as though the amount paid such pensioner should not exceed such maximum."

17. Section XIII. May State Department require county governing body to keep any records of disbursements and receipts and to make any reports on same as the State Department sees fit?

17. The State Department may require the county governing body to keep such records of disbursements and receipts for old age pensions in such manner and upon such forms as the State Department may require, and that reports of such receipts and disbursements shall be made at such time as the State Department may require -- provided, of course, that the county governing body shall make such reports annually only. See Section 13.

18. Section XIV. May State Department limit duties to be exacted of County Director by county governing body?

18. Your eighteenth inquiry should be answered in the negative. Section 14 provides that:

> "The County Director shall perform the duties **herein specified** and such other duties in the administration of this Act as the County Governing board may from time to time designate. . . ."

Accordingly, while the State Department may designate additional duties of the County Director, this department may not **limit** the duties of such director specifically prescribed by the Act.

19. Section XV. May the State Department set up any additional rules and regulations not in conflict with Act 448, which it sees fit? Are such regulations binding upon all persons connected with administration of Act 448?

19. In reply to your question 19, in my judgement, the State Department of Public Welfare is authorized through the State Board in conference with the Commission to adopt policies, rules and regulations for its government and for the administration and supervision of all forms of public assistance in Alabama. I refer you to S. B. 365 - Walton, Section 4 which provides in part as follows:

> "The State Board, in conference with the Commissioner, shall be responsible for the adoption of policies, rules and regulations for its government and for the government of the State Department; all administrative and executive duties and responsibilities of the State Department shall be performed by the Commissioner, subject to the authority of the State Board. Also the Commissioner shall be responsible for the interpretation of policies, rules and regulations formulated by the State Board of Public Welfare hereafter created."

and to section 8 of S. B. 365 - Walton which provides in part as follows:

> "The aim of the State Department shall be the promotion of a unified development of the Welfare activities and agencies of the State and of the local governments so that each agency and each governmental institution shall function as an integral part of a general system. In order to carry out effectually these aims it shall be the duty and responsibility of the State Department to: (1) Administer or supervise all forms of public assistance including general home relief, outdoor and indoor care of persons in need of assistance, and old age pensions, also including those duties that have to do primarily with the determination of need and authorization of relief now performed by the Alabama Relief Administration."

I wish to further refer you to Section 15, S. B. 397 - Simpson which provides in part as follows:

"The State Department shall supervise the administration of old age pensions under this Act. . . . . The State Department shall make rules and regulations necessary for the carrying out of the provisions of this Act to the end that old age pensions may be administered uniformly throughout the State, having regard for the varying costs of living in different parts of the State, and that the spirit and purpose of this Act may be complied with. **All such rules and regulations made by the State Department shall be binding upon its agents and subordinates and all others charged by law with the administration of this Act in this State.**"

Premises considered, it is, therefore, my opinion that your nineteenth question should be answered in the affirmative.

20. Section XVI. After confederate pensions are paid from the one mill tax provided in Article 1 of Chapter 55 of the Code of Alabama of 1923, as amended, will Old Age Pensions be a prior claim against said fund?

20. After all Confederate pensions are paid from the one mill tax provided in Article 1 of Chapter 55 of the Code of Alabama of 1923, as amended, old age pensions are a preferred claim against such fund. Section 16 provides that:

"The funds for one third of such payment shall be those arising from the one mill tax now devoted by law to the payment of the pensions provided for by Art. 1 of Chapter 55, of the Code of Ala. of 1923 as amended (Confederate pensions) and remaining after the payment of all charges against said funds for the payment of said pensions as now provided for by Art. 1 of Chap. 55 of the Code of Ala. 1923, as amended (Confederate pensions) which said Confederate pensions, in their entirety shall remain a prior, paramount and first charges against said funds."

21. (a) Section XVII. Under what circumstances could a confederate veteran be eligible for Old Age Pension?

(b) If such veteran is not drawing a confederate pension and would be eligible for Old Age Assistance, is it the duty of the State Department to make application for Old Age Assistance, for said man after March 1, 1936 whether he wishes it or not?

21 (a) A confederate veteran is eligible for old age pension when properly qualified under the terms of Act 448 upon his application for pension as therein provided.

(b) In my opinion, the provisions of Section 17 of the Act in question command that the "Board" make application for those confederate veterans who are drawing confederate pensions, who are eligible for old-age pensions and fail or refuse to apply for the said old-age pension. I find no commands of this Act concerning confederate veterans who are not drawing confederate pensions.

22. Section XVI. In the event a surplus or deficiency occurs in State funds to be apportioned to counties, does State Department have the authority to apportion money to counties according to number of persons eligible in each county? If not how shall such money be apportioned?

22. In the event a surplus or deficiency occurs in the State funds to be apportioned to counties, the State Department does not have the authority to apportion money to the counties according to the number of persons

eligible in each county. The apportionment should be made as provided for by Sec. 16, S. B. 397 - Simpson, supra:

> ".. . . . in sums bearing such proportion to the whole surplus and other funds available to be divided as the total due each County bears to the total due all counties."

23. (a) Section XVIII. What portion of the Federal grant for administration is to the State for administration?

(b) What portion to the counties?

(c) On what basis is this sum for administration to be allocated to the counties?

23. The apportionment of the funds allotted to the State by the Federal Government is provided for by Section 18 of the Act in question as follows:

> "The funds allotted to the State by the Federal Social Security Board under Section 3 (a) (2) of the Title 1 of the Social Security Act or any Act amendatory thereof, and received by the State from the United States shall be used for the administration of this Act by the State Department and the County Departments and shall be apportioned by the State Department in the following manner: (1) One-half of such funds shall be apportioned to the State Department; (2) one-half of such funds shall be apportioned to the several County Departments in the proportion to the estimate of the County Board of the total sums to be expended by their counties for old age pensions in the next quarter, reduced or increased, as the case may be, in proportion to any sum which the State Board finds that any County Board in its estimate for any prior quarter or less than the amount actually paid in old age pensions. The State of Alabama shall pay to the County Departments the amounts so apportioned at such times and under such rules relative to such payment as may be prescribed by the State Department."

24. Section XIX. In the event it seems to advantage of recipient of pension to hospitalize him and the cost of hospitalization exceeds $30.00, what is maximum amount state can contribute to this?

24. In the event it becomes necessary for the recipient for a pension to be hospitalized, because of physical incapacitation and the cost of hospitalization exceeds $30.00, the State must, nevertheless, reimburse the county for three-fourths of the necessary pension "as though the amount paid such pensioner did not exceed such maximum". See Sec. 19 of the Act quoted.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 10, 1936

Hon. C. B. Gullatt, Jr.,
Judge of Probate,
Russell County,
Phenix City, Alabama.

Non-resident may not purchase resident hunting license even though he owns land in Alabama.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of January 6, 1936, stating:

"Please advise me as follows: Where a non-resident owns property in this state and pays taxes on same will he be entitled to a Resident State Hunting License."

Replying to your inquiry, advise that a non-resident would not be entitled to secure a resident hunting license even though he owns land in Alabama.

Section 34 of an Act approved August 12, 1935, provides:

"Any person who hunts on lands other than he owns and permanently resides thereon, or rents or leases strictly for growing agricultural crops as a means of a livelihood and resides on such lands, without first obtaining a county hunting license, permitting him or her to do so, or who hunts outside of the county in which he **actually resides** without first obtaining a State hunting license, permitting him or her to do so; or any non-resident of the State who hunts in this State, without first obtaining a non-resident hunting license, permitting him or her to do so; or who lends or transfers his or her hunting license to another, shall be guilty of a misdemeanor ***".

Section 30 of said Act provides that "any person who has been a bona fide resident of the State for six months next preceding may procure a State hunting license for himself or herself . . . . ". And Section 31 of said Act provides that any non-resident of this State may procure an annual license upon paying a fee of $25.00.

Mere ownership of land, therefore, does not meet the requirements of this Act, and a person would not be entitled to a resident hunting license unless and until he meets the resident requirements.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 10, 1936

Hon. George Pearce,
Tax Collector, Marion County,
Hamilton, Alabama.

Drainage Districts -- Drainage taxes collected by County Tax Collector should be covered into the County Treasury.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for an opinion dated January 7, 1936, which is as follows:

"Please advise me to whom I must remit taxes collected from Drainage Dist. No. 4, Marion County, Alabama."

It is assumed that Drainage District No. 4 of Marion County, is established and organized under the provisions of the Constitutional Amendment

proposed by Acts of 1927, p. 346, adopted at the General Election of 1928, (see Sims v. Tigrett, 158 So. 326) which validated the Drainage Act of 1915 (Acts 1915, p. 167).

Section 35 of the last cited statute, provides in part:

> "*** It shall be the duty of the sheriff or tax collector to pay over to the county treasurer promptly the money so collected by him upon said tax assessments, to the end that the said treasurer may have funds in his hand to meet the payment of interest and principal due upon the outstanding bonds as they mature. It shall be the duty of the county treasurer, and without any previous order from the board of drainage commissioners, to provide and pay the installments of interest at the time and place as evidenced by the coupons attached to said bonds, and also to pay the annual installment of the principal due on said bonds at the time and place as evidenced by said bonds.***"

In my opinion, the taxes collected by you as Tax Collector, should be covered into the County Treasury, as provided by the validated Drainage Act of 1915, supra.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 10, 1936.

Hon. J. M. McLeod,
Judge of Probate,
Wilcox County,
Camden, Alabama.

Taxation - Mortgages - When Federal Land Bank makes deed to an individual reciting a vendor's lien reserved and such individual in addition gives a mortgage to the Federal Land Bank covering the same property, such vendor's lien and mortgage are not subject to the privilege recording tax.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of January 16 in which you state:

> "On several occasions we have recorded Vendor's Lien Deeds from the Federal Land Bank with an additional mortgage on same property. Is there any mortgage tax on these papers?"

I am not exactly sure that I understand your inquiry. However, I presume that there is a deed from a Federal Land Bank to an individual reserving a vendor's lien and that thereafter or concurrently such individual gives a mortgage to the Federal Land Bank covering the same property. If I am correct in this, there is no mortgage tax due on the vendor's lien reserved or on the mortgage. **Biennial Report of Attorney General 1930-1932, page 222.**

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 10, 1936

Hon. Omar L. Reynolds,
County Attorney,
Chilton County,
Clanton, Alabama.

Fees -- sheriff -- summoning jury in capitol cases -- sheriff entitled to amount fixed by Section 3741.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your request for opinion of January 7, 1936, in which you state the following:

"Section 3741 of the Code of Alabama of 1923, which Section relates to sheriff fees and allowances, provides as follows: 'For summoning jury in capital case, or any other special court for trial of a criminal to be paid out of the county treasury . . . . . .$5.00.' Section 3667 of the Code of 1923, which is a Section relating to cost of conviction in felony cases Provides as follows: 'for summoning jury in capital cases $3.00.'

As you will notice the former provision, Section 3741, provides payment out of the county treasury while the latter provides payment out of the Convict Fund."

Under the above facts you request my opinion as to whether or not the sheriff is entitled to both of said fees in summoning a jury in a capital case and, if not, to which of said fees he is entitled?

In my opinion, for summoning jurors in capital cases the sheriff is entitled to the fee provided by Section 3741 of the Code of Alabama, 1923. Section 3741, supra, provides in part that sheriffs are entitled to a fee of $5.00 "for summoning jury in capital case, or at any special court for the trial of criminal to be paid out of the county treasury."

The provision above underlined clearly shows that the sheriff is entitled to a $5.00 fee which shall be payable from the county treasury. See **Biennial Report, Attorney General** 1928-1930, page 944. Cf. **Biennial Report of Attorney General,** 1930-1932, page 379.

Section 3667 provides that:

"Whenever a defendant is convicted and sentenced to the penitentiary, the following items of costs in the case shall be paid out of the Convict Fund, etc.,

"For summoning jury in capital cases.....$3.00."

The purpose of Section 3667 is to reimburse the county for its expenditures to the extent of $3.00, and when collected this $3.00 should be paid into the county treasury. Section 3667 is not a limitation upon the amount to which the sheriff is entitled but merely confines the sum payable from the Convict Fund to $3.00. The difference between this amount and that set forth by Section 3741 is to be borne by the county treasury.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 12, 1936

Hon. R. E. King,
Tax Collector,
Mobile County,
Mobile, Alabama.

Statutes - (Act No. 142, approved June 15, 1935) relating to tax collector of Mobile County not repealed or rendered inoperative by Act No. 151 approved September 14, 1935.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"On June 15th, 1935, there was approved by the Governor, a local bill for Mobile County, which, among other things was to cut the official bond from the neighborhood of $700,000.00 to $150,000.00 which you can readily see is quite a saving to Mobile County. The other specified the times of making remittances to the several accounts.

"Please advise me if Act No. 531, approved Sept. 14, 1935 or the local bill applies in this case.

"If Act No. 531 applies, please advise me if I have to increase my official bond from the flat $150,000.00 to the greatest amount on hand at any one time, as shown on last years work."

In my opinion, the Local Act (Act No. 142, approved June 15, 1935) is controlling and is not repealed or rendered inoperative either in whole or in part, by the latter enactment on September 14, 1935 of Act No. 151. The latter Act is merely an amendment to General Acts of 1933, page 5.

The presumption is that a General Act does not repeal a local act. **Shepherd v. Clement,** 224 Ala. 1, 141 So. 255. See also Ala. & So. Dig. Vol. 25, Title "Statutes", Key No. 162.

By Section 7 of Acts 1933, page 51 (the statute which was amended) it was provided:

"Section 7. The provisions of this Act are not exclusive but cumulative and remedial, and this Act shall not be construed as abolishing any other method or manner now provided by law for the making of official bonds of county officers, or handling funds of county officers coming into their hands as such officers. And provided further, that nothing herein shall relieve any public official from making official bond as is now required by law, nor from liability thereon except as is provided by this Act."

This provision of the amended Act refutes any inference that may be drawn that the Legislature, by the said amendment (Act No. 151) intended to establish a uniform system of remitting tax monies.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

February 12, 1936

Dr. A. H. Collins,
Commissioner of Public Welfare,
Montgomery, Alabama.
Public Welfare Department--

Confederate Veterans--

1. Persons eligible to receive Old Age Pensions and who are receiving Confederate Veteran's Pensions are required to file application for Old Age Pension.

2. Amount received from Old Age Pension must be deducted from amount received from Confederate Veteran's Pension provided that Confederate Veteran pensioner may not receive less than amount prescribed by law.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of January 28, 1936 in which you request my opinion as follows:

"An urgent matter has arisen concerning the Old Age Assistance Law, Act No. 448. We would, therefore, appreciate having your opinion on this matter at your earliest convenience.

"Does Alabama Act No. 448, General Acts of Alabama, 1935, make it mandatory that present recipients of Confederate Pensions apply to the County Department of Public Welfare for Old Age Assistance or may such recipients continue to receive their pensions from State funds through the State Auditor?"

In reply, I wish to advise that, in my opinion, any person receiving a Confederate Veteran's Pension, who is also eligible for an Old Age Pension under the terms of S. B. 397-Simpson, is required to make application for said Old Age Pension. I find no authority of law preventing persons entitled to Confederate Veteran's pensions from continuing to receive the same from the State Auditor, except that such amount as may be paid to said pensioners as an Old-Age pension shall be deducted from the amount paid as a Confederate Veteran's pension. I refer you to Section 17 of S. B. 397-Simpson, approved September 14, 1935, which provides as follows:

"Section 17. Any person entitled to any pension under Article 1 of Chapter 55 of the Code of Alabama of 1923, as amended, (Confederate Pensions) who may also be entitled to an old age pension under the terms of this Act, shall be required to make application for a pension as herein provided. Any pension actually received by any such person under the terms of this act shall be deducted from the pension due such person under the provisions of said Article 1 of Chapter 55, of the Code of Alabama of 1923, as amended, (Confederate Pensions). If any such person shall fail to make such application hereunder on or before March 1, 1936, the State Department shall as soon as practicable thereafter, make application on his behalf in the county wherein he resides, and such application shall thereupon be heard and passed upon as if filed by such person himself. Nothing herein contained however shall ever under any

circumstances be construed or allowed to cause a Confederate Veteran or widow to receive less than he would, but for the passage of this Act."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 13, 1936

Hon. R. B. Carr,
Judge of the Seventh Judicial Circuit,
Secretary, Association of Circuit Judges,
Anniston, Alabama.

Statutes--provision of Act 1932, p. 301, for expense allowance to Circuit Judges and Circuit Solicitors not repealed by Acts 1933, p. 124.

Officers--Circuit Judges and Circuit Solicitors entitled to expense allowance provided by Acts 1932, p. 301, from effective date of said Act.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

Receipt is acknowledged of your request for opinion as follows:

"Acts of 1932, extra session, at page 301, provide as follows:

" 'Provided, however, that Circuit Judges and Circuit Solicitors in judicial circuits of more than one county shall each receive the sum of $100.00 per annum for each county of their judicial circuit over and above one and the said additional amounts to be a reimbursement of their reasonable expenses while in attendance on court outside of their home county.'

"So far as I am advised this was never paid to any of the Circuit Judges or Solicitors affected. Acts of 1933, extra session, at page 126, provide

" 'The salary of every Circuit Judge in the State shall be $4000.00'.

"The question has been raised by several members of the Association of Circuit Judges in the state and I am writing you as Secretary of the Association to get your opinion on:

" '(1) Whether or not this expense allowance as provided in the above act was repealed by the passage of the Act of 1933 which reduced the salaries of Circuit Judges to $4,000.00.

"(2) Acts of 1932, extra session, at page 301, was approved November 5th, 1932. The Act of 1933, extra session, at page 124, was approved April 14th, 1933. If the Act of 1933, extra session, at page 124, repealed the Act of 1932, extra session, at page 301, was this expense allowance payable to the Judges and Solicitors affected between the date of approval of the above two acts?

"(3) If the Acts of 1933, special session, at page 126, did not repeal the Acts of 1932, extra session, at page 301, when did the expense allowance as provided in said Act become effective, - that is, whether on the date of approval of said act or at the beginning of the next term of the officials affected.

"(4) If this expense allowance should be paid to the officials affected, what are the necessary steps to be taken to secure said payment?"

Answering your first inquiry, it is my opinion that that part of Acts 1932, page 301, which provides for expense allowance for Circuit Judges and Circuit Solicitors was not repealed by Acts 1933, page 126.

The repeal of a statute by implication is not favored. 25 Ala. and So. Dig. Title "Statutes" Key No. 159.

However, if the new statute covers the entire field, is repugnant to the provisions of the old statute and evidently is intended as a substitute for it, the new enactment repeals the old statute even though it may contain no express words of repeal. But the rule which, in my opinion, controls the present inquiry, has been declared by the Supreme Court in **Levy v. Jones**, 208 Ala. 104, as follows:

"If effect can, however, be given, consistent with the legislative intent, to a part of the provisions of the old statute, without violation of the provisions of the new, repeal by implication of the old statute by the new will be held to be only partial -- to the extent of the modification of the conflict."

The Act of 1932, supra, provides the general formula for reduction of "compensation for services performed for the State as salary or compensation," theretofore fixed by law for officers and employes receiving more than $1200.00 per annum. It makes an exception from the formula for the reduction in the case of the "allowance" to Circuit Judges and Circuit Solicitors therein referred to by fixing said allowance on the basis of a stated sum per county in excess of one, included in the judicial circuit.

The 1933 Act, supra, does not undertake to deal with this "Allowance" to Circuit Judges and Circuit Solicitors. It merely operates to fix their salaries. It provides:

"That the annual salaries of the officers and employees of the State of Alabama, hereinafter named, shall be the amounts hereinafter set opposite the respective offices, positions and employments, and shall be payable in equal monthly installments, viz:

"The salary of every Circuit Judge in this State shall be $4000.00. The salary for the Solicitor for each Judicial Circuit, except the Bessemer Division of the 10th Judicial Circuit, shall be $3000. The salary Circuit Solicitor 10th Judicial Circuit, Bessemer Division $1,500. The salary of the First Deputy Circuit Solicitor for the 10th Judicial Circuit shall be $2,100.00, the salaries of the second and third Deputy Circuit Solicitors for the 10th Judicial Circuit shall be (each) $1,500, the salary of the Deputy Circuit Solicitor for the 10th Judicial Circuit Bessemer Division shall be $900.00. The salary of the Assistant Circuit Solicitor of the 15th Judicial Circuit shall be $1,080.00. The salaries herein provided for the Circuit Judges and Solicitors or Deputy Solicitors or Assistant Solicitors is the amount of portion thereof to be paid by the State and nothing herein shall be construed to affect any provision of the law for the payment by any County of any additional amount of salary to any such officer or officers."

Of course, as to the salary of the Circuit Judges and Solicitors, the 1933 Act repeals the 1932 Act. But the provision in the 1932 Act for "allowances"

to these officers, was not affected by the 1933 Act nor by any other provision of law which has come to my attention, and the same is still in force.

In this connection, the distinction between "salary" or "compensation" and "allowances for expenses" must be kept in mind. As employed by legislative bodies and as defined by the Courts the two terms relate to wholly different things.

See Osborne v. Henry, 200 Ala. 353, (H. N. 2) and cases there cited.

In Ex Parte Pickett, 24 Ala. 91, and in Hall vs. Blan, 227 Ala. 64, the Supreme Court held that the "pay" of members of the Legislature provided (in the first cited case) by Section 43 of the Code of 1852, and that (in the last cited case) later fixed by Section 49 of the Constitution of 1901, included compensation for the services of the members and reimbursement for their expenses during the period they were required to be absent from the homes in the performance of their official duties. But the rule laid down in these cases is not applicable here.

In the Pickett case, the Court was construing a section of the Code of 1852, which was couched in language wholly different from that employed by the Legislature in the Act of 1932 and 1933, hereinabove quoted; and in the Hall case, the Court had under consideration, the effect of Section 49 of the Constitution of 1901 as a limitation upon the "power" of the Legislature to increase the "pay" of its members.

There is no constitutional limitation upon the power of the Legislature to provide for the travelling or incidental expenses of Circuit Judges and Circuit Solicitors.

Cf. Hall v. Blan, (h. n. 1) supra;
See also Constitution of 1901, Sections 150 and 167.

In Woodruff v. Beeland, 220 Ala. 652, the Supreme Court had under consideration the power of a County Board of Education to make an allowance for expenses to a County Superintendent of Education. Whether such an "expense allowance" was a part of the Superintendent's salary, was not decided, - the case going off upon another point. In so far as I am advised, there is no direct decision of our Supreme Court upon the precise question. However, other jurisdictions have decided it.

In Macon County v. Williams, 224 S. W. 835, the Court of last resort of Missouri had up for decision the question whether a statutory allowance to Circuit Judges, while engaged in holding court in counties of their circuits other than that of their respective residences, was a part of the "compensation" of such officers within the meaning of a provision of a statute of that State.

The conclusion of the Court that such an expense allowance was not within the contemplation of the term "compensation," as the same was used in the statute, is well supported by citation in the opinion of decisions of the Courts of last resort of other States and of the United States. The opinion in the case from the last named Court, (Smith v. Jackson, 246 U. S. 388, 38 S. C. 353, 62 L. Ed. 788), was merely the adoption of that of a learned Alabama trial judge, the late Judge Henry D. Clayton of the Middle and Northern Districts of Alabama. (See 241 Fed. 747). Judge Clayton's reasoning there is, in my opinion, peculiarly apt here.

An answer to your second inquiry is unnecessary, in as much as the answer to the first question disposes of the same.

In my opinion, the effective date of the 1932 Act, supra, and not the beginning of the succeeding terms of the respective officers, is the criterion as to time of accrual of the claims for the allowances provided for by said statute.

In view of Section 150 of the Constitution, this would be true as to the allowances to Circuit Judges, even conceding that the said allowance was held to be a part of the "salary" of such officers.

Stone v. State, 20 Ala. App. 69, and cases there cited.

But, in such event, the allowance to Circuit Solicitors could not be made effective to increase their compensation during their respective terms of office.

Cf. Brandon, Auditor vs. Askew, 178 Ala. 160.

However, as appears hereinabove, in my opinion these expense allowances have no relation to the "allowances, fees or compensation" of either the Judges or Solicitors, and neither Section 68 nor 281 of the Constitution is applicable.

Answering your fourth inquiry, it is my opinion that a request to the State Comptroller, for payment of the allowance due is the proper procedure to secure such payment.

In this connection, your attention is directed to the rule that the fixing by the Legislaure of the salary of a public officer holding for a definite term operates as an effective appropriation of the sum so fixed.

Nichols v. Comptroller, 4 Stew. P. 154.
Riggs v. Brewer, 64 Ala. 282;
State v. Smith, Auditor, 188 Ala. 432; 66 So. 61.

In my opinion, by analogy, this rule applies to the allowances to Circuit Judges and Circuit Solicitors fixed by Acts 1932. Supra.

As to the portion of the allowance accrued in any prior fiscal year, the same probably should be paid from any funds in the State Treasury not otherwise appropriated; and as to the portion thereof accruing in the current fiscal year, and hereafter accruing, the appropriation is made by the 1932 Act, supra, fixing the amount thereof.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 14, 1936

Hon. Eugene B Henry,
Commissioner of Licenses,
Jefferson County,
117 Court House,
Birmingham, Alabama.

Licenses- Wholesaler liable also for license imposed by Schedule 147 of the 1935 Revenue Act, on facts stated.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of December 23, 1935, in which you state:

"An established wholesale business selling automobile tires and accessories through salesmen and delivering to purchaser by said salesman under bona fide bills of sale and who put additional automobile accessories in truck in anticipation of the needs of customers additional to that for which he has a bona fide order; said additional accessories to to be delivered to said customer if needed, would such dealer be liable for license under Schedule 147 of the present Code?"

It is my opinion that your question should be answered in the affirmative.

I am assuming that the customers referred to in your letter are retail merchants who offer the accessories bought from the trucks for resale.

When the wholesale merchant allows his salesmen to sell goods and make deliveries from his trucks, then he is not conducting a regular wholesale business, but comes within the classification of a transient dealer.

I call your attention to part of Schedule 147 of the 1935 Revenue Act, which is as follows:

"SCHEDULE 147. Each person doing business as a transient dealer as defined in this Schedule and who does not pay the privilige license under Schedule 33, or the license permit under Schedule 159.16 shall pay an annual license tax to the State of $30.00. The payment of one State license shall authorize such transient dealer to engage in such business in any county in the state upon the payment of a county license of Five ($5.00) Dollars in each such county. Definition of Transient Vendor or Dealer: (a) When used in this section, the words 'transient dealer' shall be held to include any person or persons who shall be embraced in any of the following classifications: (b) All persons acting for themselves or as an agent, employee, salesman, or in any capacity for another, whether as owner, bailee or other custodian of goods, wares and merchandise, and going from person to person, dealer to dealer, house to house, or place to place, and selling, or offering to sell, exchanging or offering **to exchange, for resale by a retailer,** any goods, wares and merchandise, or, (c) All persons who do not keep a regular place of business open at all times in regular business hours, and at the same place, who shall sell or offer for sale goods, wares and merchandise, or (d) All persons who keep a regular place of business open during regular business hours, and at the same place, who shall elsewhere than at such regular place of business sell or offer for sale or at the time of such sale deliver goods, wares or merchandise, or, (e) All persons who go from person to person, or house to house, or place to place, or dealer to dealer, and sell or offer for sale or exchange the goods, wares and merchandise which they carry with them, and who deliver the same at the time of , or immediately after the sale, or without returning to the place of business operations (a permanent place of business) between the taking of the order and the delivery of the goods, wares and merchandise, or, (f) All persons who go from person to person, house to house, place to place or dealer to dealer, soliciting orders by exhibiting samples, or taking orders, and thereafter

sending the order to the permanent place of business, and thereafter making delivery of the goods or filling the order, without carrying or making delivery of the goods pursuant to the terms of the order, or, (g) All persons who go from person to person, place to place, house to house or dealer to dealer, carrying samples and selling goods from samples and afterwards making delivery without taking or sending an order therefor to a permanent place of business for the filling of the order and delivery of the goods, or the exchange of the goods, or the exchange of merchandise having become damaged or unsalable, or the purchase by **merchandise** of advertising space, or, (h) All persons who have in their possession, or under their control any tangible property offered, or to be offered for sale, or to be delivered, unless the sale or delivery thereof is to be made in pursuance of a bona fide order for the goods to be sold or delivered, said order to be evidence by an invoice or memorandum.***"

I enclose a copy of an opinion rendered by this office on October 30, 1935.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 14. 1936.

Mrs. Mary H. Fowler, Superintendent,
State Training School for Girls,
Box 38, West End,
Birmingham, Alabama.

Juvenile Court—Has jurisdiction under Section 3539 of the Code of 1923 to commit delinquent girls over sixteen and under eighteen years of age to the State Training School for Girls.

Opinion by Assistant Attorney General Rowe.

Dear Madam:

I have your request for opinion dated December 17, 1935, as follows:

"I would appreciate an opinion from you regarding a commitment of a female child, Clemmie Smith, who is between the ages of sixteen and seventeen years, to the State Training School for Girls.

"The Probate Judge of Wilcox County, Alabama wishes to commit this child to the State Training School for Girls and has asked me to receive said child into said institution on said commitment. It has been suggested to me that a female child of over 16 years of age cannot be committed to the State Training School for Girls.

"I note that the words 'delinquent child' are defined under Section 3528, Par. 3, of Ch. 1, Art. 1 of the Code of Alabama of 1923. I also note that under General Acts of the State of Alabama, 1931, page 277, section 5, an Act creating the State Training School for Girls, the following is set forth: No girl under the age of 12 years or over the age of 18 years shall be committed to the State Training School for Girls.

"It appears to me that, unless there is some other law covering the subject matter, these two sections of the law conflict with each other.

"This is a very important matter to the State Training School for Girls, as we have lots of applications for the commitment of girls who are over sixteen years of age and under eighteen years of age, and I

would like for you to tell me whether or not a girl between the ages of sixteen and eighteen can be legally committed to the State Training School for Girls by the Juvenile Courts of the several counties of the State of Alabama or by any court having jurisdiction over children.

"I understand that the Probate Court of Wilcox County did not have jurisdiction over said child before she was sixteen years of age, but wishes to file a petition now and place the girl in the Training School."

In my opinion, the Juvenile Court of Wilcox County or any Court in said County exercising juvenile jurisdiction as provided by Section 100 of the Code of 1923, as amended by Acts 1931, pages 353 et. seq. (Chapter 100 1932 Sup. to the Alabama Code of 1928, Ann.) has full power and jurisdiction to commit a juvenile delinquent over the age of sixteen years and under the age of eighteen years to the State Training School for Girls or to make such other or further disposition of the custody of said juvenile delinquent as may to the court seem meet and proper.

Although the statute, supra, generally defines "dependent children", "neglected children" and "delinquent children" as those **under the age of sixteen years who come within the terms thereof,** your attention is particularly invited to Section 3539 of the Code of Alabama, 1923, as follows:

"Nothing in the Chapter shall be construed as forbidding the arrest, with or without warrant, of any child as is now or may hereafter be provided by law, or as forbidding the issuance of warrants by magistrates as provided by law. Whenever a child under sixteen years of age is brought before a magistrate of any court in the county other than the juvenile court, charged with any offense, such magistrate or court shall forthwith, by proper order, transfer the case to the juvenile court of the county. Any criminal court or any court exercising criminal jurisdiction in any county coming under the provisions of this chapter before which any child between the ages of sixteen and eighteen years is brought, charged with the commission of a crime, shall have authority, if such court shall deem it to be in the interest of justice and of the public welfare, to in like manner transfer such child by proper order to the jurisdiction of the juvenile court of said county to be dealt with as a delinquent child under the terms of this chapter and when so transferred such child shall come under all terms and conditions of this chapter and be so dealt with as other children are dealt with under this chapter. All information, depositions, warrants and other processes in the hands of such magistrate or court shall be by him or by the judge of said court forthwith transmitted to the juvenile court and shall become a part of the records of the juvenile court. The juvenile court shall thereupon have jurisdiction of the cause and shall proceed to hear and determine the case so transferred to it, in the same manner as if the proceedings had been instituted in the juvenile court by petition as hereinbefore provided."

See also Powell et al v. State, 141 So. p. 201.

Under the above quoted provision "any Criminal Court or Court exercising criminal jurisdiction, before which any child between the ages of sixteen and eighteen years is brought **charged with commission of a crime,** shall have authority, if such court shall deem it to be in the interest of justice and of public welfare, to, in like manner, transfer such child by proper

order, to the jurisdiction of the Juvenile Court of such county, to be dealt with as a delinquent child, under the terms of the Chapter governing delinquent children; and when so transferred, such child shall come under all of the provisions of the statute dealing with such delinquents."

This provision is ample to cover the situation in your letter.

If the child, Clemmie Smith, is arrested on a warrant of a Justice of the Peace, or the process of any other court exercising criminal jurisdiction, the magistrate or judge may, if he deems it proper, transfer the cause to the Court in Wilcox County which has and exercises juvenile court jurisdiction.

Under Section 5 of the State Training School Act (Acts 1931, p. 272), it is specifically provided that girls over the age of twelve years and under the age of eighteen years may be committed to the said institution. The fact, if it be a fact, that the juvenile court of any county did not have jurisdiction of the child before she was sixteen years of age is not material, if said court does obtain jurisdiction prior to the time when she becomes eighteen years of age.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 14, 1936.

Hon. John D. Chichester, Chairman,
Alabama Real Estate Commission,
Capitol.

Alabama Real Estate Commission—

1. Alabama Real Estate Commission held to have authority to elect "Assistant" to the Commission, term him "Director", and fix his compensation at $175.00 per month.

2. Present "secretary" of the Commission held to be eligible for the place of "Director" or "Assistant".

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of January 28, 1936 requesting my opinion as follows:

"Attached hereto are two resolutions which were adopted at a meeting of the Alabama Real Estate Commission held in Montgomery on January 21st, 1936; one of these resolutions creating the office of Director and the second resolution setting the salary of the office at $175.00 per month and appointing to this office, Mr. George A. Thomas, the present Secretary of the Alabama Real Estate Commission.

"The purpose of creating the office of Director was brought about, due to increasing responsibilities of the Commission on account of economic conditions, and to broaden the scope of the work that is now being extended to the general Public and the Real Estate interests at large.

"For your information, the Real Estate License Law was passed at the instigation of both the Real Estate Agents and the property owners of the State—the primary object in the creation of this Commission having a two-fold purpose: first, to protect the interests of the Public

from unscrupulous Real Estate Brokers or Salesmen. Second, to elevate the Real Estate profession to a higher plane.

"The Commission is self-supporting, receiving no monies from the General Fund of the State of Alabama, in fact, the Commission pays into the General Fund the monies on hand at the end of each fiscal year.

"The Alabama Real Estate License Law was introduced in 1927 by Representative Rogers of Mobile and is known as House Bill No. 377—Rogers.

"With reference to this Act, and the authority invested in the three members of the Commission, your attention is respectfully called to Section 3, a portion of which reads as follows:

> 'The Commission immediately upon the qualifications of the members appointed in each year shall organize by selecting from its members, a chairman and may do all things necessary and convenient in carrying into effect the provisions of this Act and may from time to time promulgate necessary rules and regulations.'

"As stated above, the Commission, realizing that the department should broaden the scope of its work due to the increase of responsibilities, elected under this Section 3, to create the office of Director and chose to appoint to the newly created office, its present Secretary, Mr. George A. Thomas at a salary of $175.00 per month.

"The Commission members have requested that an opinion be rendered by you, stating whether the action taken in the attached resolutions creating the office of Director at the stipulated salary is within the authority of the Commission."

with attached following resolutions:

"At a meeting of the Real Estate Commission held in Montgomery, Alabama, in the Executive office of the Commission on the 21st day of January, 1936, the following Resolution was offered by Commissioner Hamilton, seconded by Commissioner Baum and approved by Chairman Chichester:

"WHEREAS, it is deemed necessary for the best interest of this Department to extend the duties, to broaden the scope of the work, and increase the responsibilities of the head of the Department in the Executive Office; that the office of Director be created.

"WHEREFORE BE IT RESOLVED, that in addition to the duties heretofore performed by the Secretary, the Director shall be required to be responsible to the Commission for all matters in connection with all Hearings, and in the elimination of such Hearings as in the judgment of the Director may be considered advisable. That authority is hereby given him to issue subpoenas to the Sheriff of attendance of witnesses at Hearings, and issuance of subpoenaes for arrest of all persons found by him to be be in violation of the Act, to such extent, as in his judgment, warrants such action. That he shall be required to extend his travels throughout the State in personal contact, not only with all Licensees, but to attend meetings of Real Estate Brokers thorughout the State, where matters affecting the welfare of this Department, and the better carrying out of the provisions of the Act may be involved.

"The intention of this Resolution being to extend for the betterment of the Department, the authority, and responsibility in the Executive Office, and to hold the Director accountable therefor."

In reply I wish to advise that Section 3 of the Acts of 1927, page 336 provides in part as follows:

"The Commission shall employ, and at its pleasure discharge, a secretary and such clerks and assistants as shall be deemed necessary to discharge the duties imposed by the provisions of this Act, and shall outline their duties and fix their compensation, subject to the general laws of the State."

In my judgment, the term "assistant" quoted in the above named Act is sufficiently broad to include "Director" whose duties constitute him an assistant to the Commission when such "assistant" is deemed necessary by the Commission.

In my judgment, the Commission is empowered by the above quoted provisions of law to fix the salary of the "assistant", here named "Director", at $175.00 per month. I refer you to the above quoted provisions of law and call your particular attention to the phrase "fix their compensation, subject to the general laws of the State". I find no provisions of the general law in conflict with the holding here announced.

The fact that the assistant to be named is at present secretary to the association does not, in my opinion, preclude his election to the said place of "Director" or "Assistant" to the Commission.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 15, 1936.

Hon. Joseph R. Bell,
County Solicitor for Lowndes County,
Hayneville, Alabama.

County Superintendent of Education—Incumbent in office in Lowndes County at time of enactment of Local Acts 1931 p. 41 is exempt under Section 7 thereof from the professional qualifications therein prescribed, and may become candidate for said office at any subsequent election.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"Whether the provision of Section 7, Local Acts 1931, page 41, exempts the incumbent in the office of County Superintendent of Education of Lowndes County on March 10, 1931, the date of the approval of the Act, from possession of the qualifications required by the Act of all other candidates for such office, so long as he lives and desires to become a candidate to succeed himself to such office; or, does this provision exempt such incumbent from possession of such qualifications **only during the term for which he became a candidate in the year 1932?"**

In my opinion, the Local Act cited in your request exempts the incumbent at the time of its enactment from possession of the qualifications there-

in laid down as a prerequisite to his becoming a candidate for the office at **any** succeeding election.

Section 7 of the Local Act provides:

> "Section 7. That no person can become a candidate for said office of Superintendent of Education of said County, unless said person shall possess the following qualifications, as fixed by the general laws of the State of Alabama, viz; such candidate shall hold an Alabama certificate in administration and supervision based as a minimum upon graduation from a Standard Normal School or equivalent education, with at least one year of additional study of college grade and proof of three years successful teaching experience during the five years next preceeding his election; that the provisions of this Section shall not apply to the County Superintendent of Education now in office, should he desire to become a candidate for office, in the year 1932."

In my opinion the phrase "in the year 1932" contained in the last line of said Section is descriptive merely. What could have been the Legislature's reason for providing that the incumbent, although not possessed of the professional qualifications therein prescribed, might become a candidate for the office at the next succeeding term only? None is indicated in the Act, and I can find none from any other source. On the other hand, what could have been the Legislature's reason for providing that the incumbent, although not so professionally qualified by formal education, might become a candidate at **any** succeeding election? In my judgment, the Legislature considered that actual and practical experience as the chief executive officer of the County School system for a term was **at least** the equivalent of the formal education therein prescribed as a minimum for eligibility, in weighing the fitness of a particular person for election to the office.

I grant that the language employed by the Legislature in Section 7, supra, is not entirely clear, but the Legislative intention must be sought for and, when found, is controlling. It is a cardinal principal of statutory construction that "a statute should be given effect according to its purpose manifested by its language and other rules of construction. The court is often not controlled by literal language of the statute but by its meaning when properly interpreted, though outside of such literal language." See **Abramson vs. Hard,** 229 Ala. 2, Headnotes 4 and 5 and cases there cited.

The Supreme Court of Indiana in the case of State ex rel. Devericks vs. Swails, 142 N. E. 706 had under consideration the question of the proper construction of a statute of that state pertaining to the eligibility of incumbents in the office of County Superintendent of Schools, under a provision thereof for an exemption of incumbents from the general professional qualifications therein prescribed. In disposing of the question, the Court said:

> "The most obvious import of the language used in the proviso in question is that, if an incumbent possessed the qualifications required by the act of 1911 at the time of his former election, then the act in question does not disqualify him. The phrase, 'Shall have qualified,' is in the future perfect tense. This is a tense expressing action as past, with reference to a point in the future. Standard Dictionary. Evidently the Legislature had in mind, not to change the qualifications of those already in office, but to recognize the advantages of experience as equal to the increased qualifications for new officers."

Although not precisely in point on the question here under consideration, the reasoning of that case, is, in my judgment, applicable here.

Any former opinion of this office in conflict with this conclusion is hereby withdrawn and overruled.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 17, 1936.

Hon. J. L. Kaufman, Chairman,
Unemployment Compensation Commission,
Montgomery, Alabama.

1. Unemployment Act—Independent contractor not included.

2. Unemployment Compensation Act—Insurance Agent working strictly on commission not included.

3. Unemployment Compensation Act—Defining independent contractor.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I am in receipt of your letter of January 16, 1936, in which you request my opinion as follows:

"I would like a formal ruling if possible on the following questions in connection with the Unemployment Compensation Commission of this State, Act No. 447.

Section 2, Sub-section G, defines "employment" as any employment in which all or a greater part of the persons working (within a continental U. S.) is or was customarily performed within this State under any contract or hire, oral or written, express or implied whether such person was hired or paid directly by the employer or through any other person employed by the employer, provided the employer had actual or constructive knowledge of such contract. Is it your opinion that an independent contractor comes wihtin a definition of employment as set out?

"(2) Is an insurance agent who works strictly on commission basis under this Act?

"(3) What is to be considered in determining whether a person is an independent contractor?"

I am of the opinion that an independent contractor does not come within the definition of employer. In construing the Alabama Workmen's Compensation Act which also relates to "services for hire", our Supreme Court has interpreted the law not to include independent contractors. In the words of the Court:

"* * * The law of independent contractors was in no wise changed by the enactment of the Compensation Statutes and this court has given due consideration thereto in the decided cases. * * *". (Birmingham Post Co. v. Sturgeon, 149 So. 74.)

I believe that the Supreme Court will construe the Unemployment Compensation Act similarly.

An Insurance Agent working strictly on commission would not come under this Act. In Aldrich v. Tyler Groc. Co., 206 Ala. 138, 89 So. 289 (17 A.L.R. 617) the Supreme Court of Alabama held that a city salesman using his own car and working on commission was an independent contractor.

The Gourts of several States have definitely held that agents soliciting insurance are independent contractors.

Hewett v. Casualty Co. (Mass. 1916) 113 N. E. 572.
American Savings Life Ins. Co. v. Replinger (Ky. 1933) 60 S. W (2nd) 115.
Income Life Ins. Co. v. Mitchell (2nd) 115.
Income Life Ins. Co. v. Mitchell (Tenn. 1935) 79 S. W. 572.

As to what factors are to be considered in determining whether a person is an independent contractor, the Alabama Supreme Court in the case of Birmingham Post Co. v. Sturgeon, Supra, said:

"It is not possible to lay down a hard and fast rule or state definite facts by which the status of men working and contracting together can be definitely defined in all cases as employee or independent contractor. Each case must depend on its own facts. Ordinarily, no one feature of the relation is determinative, but all must be considered together."

* * * * *

"This court has had occasion frequently to point out the distinguishing characteristics between the relation of an independent contractor and that of a servant. A clear and concise statement of such distinction is made in our case of Republic I. & S. Co. v. McLaughlin, 200 Ala. 204, 75 So. 962, to the following effect: The relation is 'determined by whether or not the person for whom he is working "has control over the means and agencies" by which the work is done (Citing cases), (and) or has control over the means and agencies "by which the result is produced" (Harris v. McNamara, 97 Ala. 181, 12 So. 103.) In line with this test is the rule that he is deemed the master who has the supreme choice, control, and direction of the servant, and whose will the servant represents, "not merely in the ultimate result of his work, but in all its details" (Lookout Mt. I. Co. v. Lea, 144 Ala. 169, 39 So. 1017).' For the person to be a servant the other party must retain 'the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, not only what shall be done, but how it shall be done' (39 C. J. 35), as he has 'a reserved control or direction of the work' (Alabama Power Co. v. Bodine, 213 Ala. 627, 105 So. 869). 'Giving orders is the role of the master.' Alabama Power Co. v. Bodine, supra."

In the case of Martin v. Republic Steel Co., 146 So. 276, the court held that the criterion is not whether the owner did in fact exercise supervision, "but rather did he have the right to do so; did he possess the power to control." (See also General Refrigeration Sales Co. v. Taylor, 158 So. 314).

You will find the reading of the Birmingham Post Co. v. Sturgeon, supra, interesting and instructive in this connection.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 17, 1936.

Hon. W. F. Nall,
Custodian of County School Funds,
Pike County,
Troy, Alabama.

Schools—Act No. 60, H. 366, approved March 10, 1933, (Acts 1933, p. 51) as applicable to the County Treasurer of School Funds, appointed under Section 94 of the School Code of 1927, applies to the County Custodian of School Funds appointed under Act No. 507, S. 424, approved September 13, 1935, (Acts 1935, p. 1090).

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of February 7, 1936, in which you request my opinion as follows:

"Do the provisions of Act No. 60, H. 366, approved March 10, 1933 (Acts 1933, p. 51) as applicable to the County Treasurer of School Funds, appointed under Section 94 of the School Code of 1927, apply to the County Custodian of School Funds, appointed under Act No. 507, S. 424, approved September 13, 1935 (Acts 1935, p. 1090)?"

I am of the opinion that your inquiry should be answered in the affirmative.

Act No. 507, S. 424, approved September 13, 1935 (Acts 1935, p. 1090) amended Section 94 of the School Code of 1927. The 1935 Act merely created the office of Custodian of County School Funds in lieu of the County Treasurer of School Funds. The functions and duties of each office are practically the same. The 1935 Act was silent as to some of the functions and duties of the office. It is necessary to refer to other provisions of law to give the 1935 Act a full field of operation. Said Act repealed only laws or parts of laws in conflict. (See Section 11.) It did not repeal any other provisions of former laws.—**Opinion of Attorney General to State Superintendent of Education on January 10, 1936.**

The question then presents itself as to whether or not the provisions of Act No. 60, H. 366, approved March 10, 1933, (Acts 1933, p. 51) as applicable to the County Treasurer of School Funds are in conflict with the 1935 Act, supra. The most pertinent part of the 1933 Act relative to this question is Section 3 of said Act, which provides as follows:

Section 3.

"Upon the application of the County Treasurer of School Funds it shall be the duty of the County Board of Education of the County to appoint a bank or trust company as a depository in which such officers may deposit monies coming into their hands as such officers; which appointment shall be by proper resolutions spread upon the minutes of such County School Board. Such County School Board shall from time to time by resolution spread upon its minutes, make such requirements as may be deemed necessary for the safety of such funds so deposited, not inconsistent with the general laws of the State."

The pertinent part of the 1935 Act supra, is Section 1, which provides as follows:

"Section 1. That Section 94 of the Alabama School Code of 1927 be so amended as to read as follows: 94. CUSTODIAN OF COUNTY SCHOOL FUNDS.—The county board of education shall appoint a custodian of the public school funds of the county, which custodian may be the county treasurer, the secretary to the county superintendent of education, or some other qualified person. The custodian of school funds shall give bond in a surety company authorized to do business in Alabama; shall receive and take charge of all moneys to which the county board of education may be entitled by law or which may come into its possession for public school purposes; shall pay out such moneys only on the written order of the county superintendent of education, approved by the chairman of the county board of education; shall keep an accurate record of all receipts and expenditures; and shall make such reports as may be required by law by the county board of education, or by rules and regulations of the State Board of Education. The amount of the bond of the custodian shall be fixed by the county board of education and approved by the State Board of Education through its executive officer, the State Superintendent of Education, with whom a certified copy shall be filed."

It will be seen from the above that the only variance in the two Acts is in the name of the office. By substituting County Custodian of County School Funds in lieu of County Treasurer of School Funds in the 1933 Act, supra, said Act has a complete field of operation.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 20, 1936.

Hon. Marvin Pearce, Member,
Court of County Commissioners of Marion County,
Winfield, Alabama.

1. Counties—Commissioners Courts.

Members of the Court of County Commissioners are entitled to the per diem and mileage fixed by law, when discharging their duties as members of such court whether such court be holding a regular, adjourned or special term.

Opinion by Assistant Attorney General Moore.

Dear Sir:

Sometime ago you wrote me with reference to the compensation of members of the court of county commissioners. In substance you requested me to advise you if the members of your court were entitled to per diem and mileage for only regular terms of the court. The expression "regular terms" being limited only to the session provided by Section 6752 of the Code of 1923, said section stating:

"Regular terms of the Court are held on the second Mondays in February, May, August and November."

As I understand your letter, the claim is asserted that county commissioners may be paid for only four days per year.

You call my attention to an opinion appearing in Biennial Report 1930-32 at page 550. I call to your attention opinions appearing in Biennial

Report 1928-1930 at pages 785 and 851 and also in Biennial Report 1932-34 at pages 266 and 431. All of these opinions treat of the general subject. The last opinion appearing in the 1932-34 Biennial Report at page 431 was written subsequent to the 1931 amendment to Section 6771.

It seems from your letter that these opinions are being so construed to prohibit the payment of the per diem and mileage except for the four days fixed by Section 6752 for regular terms.

I do not take it that these opinions positively so hold so far as the per diem and mileage of the members when attending meeting of the court, meeting as an official body.

That the commissioners court have the right and power to hold adjourned terms, would, I think, in the absence of specific prohibition be almost inherent. However, that there is such right has been clearly recognized.

In **Matkin v. Marengo County,** 137 Ala. 155, the "orders of the Court at an adjourned term of the Court on the 9th day of July from the regular May term of said Court" were held to have been made properly.

In Commissioners Court v. Ballard, 64 So. 311, the Supreme Court said:

"It is insisted for appelee that the order establishing the private road in question was attempted to be made at a time other than that at which the regular terms of the commissioners' court are provided for by law (Code, Section 3310), and from this premise appellee's counsel cite a line of authority pronouncing invalid judicial acts by courts of law and equity at times and places other than those authorized by positive law. In proceedings to establish public or private roads the commissioners' courts are clothed with and exercise judicial, executive and legislative power. Ballard v. Cook, 166 Ala. 110, 52 So. 147. Such courts, in such matters, are not subject to the rule counsel assert. Code, Sections 5765, 5767, 5774, 5819. A reading of these Sections will also demonstrate that the lawmakers did not intend to restrict such 'boards' in dealing with public or private roads, to the regular terms provided by law."

In Hicks v. State, 75 So. 636, (Ala. App.) the Court said:

"Although the powers conferred by the Act of September 22, 1915, are vested in the court of county commissioners and not the individuals constituting its personnel, yet in the exercise of its legislative functions it is not subject to the rules applied to judicial courts as to the time and place such courts must exercise strictly judicial functions. Commissioners' Court of Coffee County v. Ballard 185 Ala. 501, 64 South, 311; Ballard v. Cook, 166 Ala. 105, 52 South. 147.

"But, if such rules applied it was within the authority of the court to adjourn its terms from time to time, within its discretion, and exercise the powers at such adjourned term. Matkin v. Marengo Co. 137 Ala. 155, 34 South, 171.

"The Commissioners' Court being a court of 'unlimited jurisdiction' in the matter of establishing public roads, in the absence of an affirmative showing to the contrary, the presumption will be indulged that its proceedings in such matter were in all things regular. Matkin v. Marengo County, supra; McLaughlin v. Hardwick, 14 Ala. App. 570, 70 South, 305; Stephens v. Court of Commissioners, 180 Ala. 531, 61 South, 914.

"It appearing that the jurisdiction of the court was properly invoked by a petition to establish the road, though irregularities may appear in the proceedings, the judgment is not subject to collateral attack, Logan v. Central Iron & Coal Co., 139 Ala. 548, 36 So. 729; Golden v. State, 10 Ala. App. 235, 64 So. 517."

Again in Brown v. Shelby County, 204 Ala. 253, (85 So. 416) the Supreme Court speaking through Justice Thomas said:

"That part of the minutes of the court of county commissioners, June term, 1905, reciting indebtedness to Bynum Construction Company, for the erection by that company, for the county, of the public bridge in question, and providing for the levy of a special tax to pay for the same, was competent as tending to show that the bridge was erected by authority of the court of county commissioners and by such independent contractor pursuant thereto. The June term of court was the time fixed by law (Code 1896, Sections 3977, 3985) for the levying of taxes. The order of July 3, 1905 showing adoption or ratification of the contract in question, made for the court by two of its members, was likewise competent evidence. Matkin v. Marengo County, 137 Ala. 155, 158, 34 South, 171. In Commissioners Court of Coffee County vs. Ballard, 185 Ala. 501, 64 So. 311, speaking of the term of courts of county commissioners or boards of revenue in which is vested executive, legislative and judicial power in the establishment of public or private roads, it is said that such courts may establish such roads at a time other than the regular terms of the court as provided by statute; that is to say, the exercise of such power is not restricted to regular terms of said court. This decision is in line with the pronouncement contained in Barks v. Jefferson County, supra, that commissioner's courts exercise an original quasi legislative, judicial and executive power under the Code of 1896 to establish bridges and it follows that such courts in dealing with the establishment of roads, bridges, ferries and causeways, were not restricted to their regular terms. Hicks vs. State, 16 Ala. App. 88, 75 So. 636."

The matter was adverted to at length in Board of Revenue of Covington v. Merrill, 68 So. 971, in which the Court said:

"The statute fixes, as we have seen, the day of the meeting in regular session 'on the second Monday in February, April, August and November respectively of each year, and such other special sessions as are now or may hereafter be required by law to be held by courts of county commisisoners or other courts of like jurisdiction.' The statute does not, by fixing the day on which the regular sessions shall begin, limit the action of the board of revenue in general session to this designated second Monday. It does not require that all the county's business shall be concluded by the court in that one day. They are required to meet in regular session on that day, and are permitted and expected to continue the session from day to day, or as they may in session determine and declare till the public business is concluded. The special session provided for in the act is not prolongation of a regular session in the dispatch of the public business; it may be called when a proper adjournment has not been taken in regular session to a subsequent date. The regular session must begin on this day, and must be concluded or prolonged, or adjourned to any other time the judgment or convenience of the board may dictate, not to extend beyond the next regular session. Any other construction of the statute would narrow this necessary general authority reposed in

the court or board, and interfere with the proper conduct of the county's business by the officials to whose judgement such matters are confided by the electorate of the county.

"If the minutes of the court show that the court was in session on the second Monday, and that they were in session on the next or succeeding days, thereafter, the continuance of the regular session would be presumed. The minutes will not be required to show the prolongation of the general quarterly sessions from day to day, if the court was in continuous session. If, however, the court was not in continuous session, but it was thought to the best interest of the county, or most convenient to the court, to adjourn to the subsequent day within that term, this might be lawfully done. Though done at adjourned terms the acts of the board have the same validity as if done on the day of the regular meeting prescribed by law.—Hays v. Ahlrichs, supra; Ashford v. McKee, 185 Ala. 620, 635, 62 South, 879; Lewis v. Intendent, 7 Ala. 85; Williams v. State, 67 Ala. 163, 186; Revel v. State, 26 Ga. 275; People v. Northrup, 50 Hard (N.Y.) 147."

See also Lewis v. Gainesville, 7 Ala. 85; Hays v. Aldrich, 115 Ala. 229, 22 South. 465; Edwards v. Bibb County, 193 Ala. 534, 538, 59 So. 449.

Special terms are provided by Section 6753.

From the foregoing it clearly appears that any regular term of the Court may be continued from day to day or adjourned from time to time, so long as such adjournment was to a date prior to the next regular term, and that the actions and orders of the court made at such adjourned sessions not otherwise objectionable are legal and proper.

Section 6771 of the Code of 1923 as amended by Act No. 669 approved July 31, 1931 (Acts 1931, p. 805) provides:

"That Section 6771 of the Code of Alabama of 1923 be and the same is hereby amended to read as follows: each member of the court of county commissioners and board of revenues in each of the several counties of the State of Alabama shall be paid out of the county treasury of their respective counties for their services the sum of $3.00 per day while occupied in the discharge of their duties as such members of the court of county commissioners or board of revenue, and five cents per mile in going to and returning from their respective courts, and the sum of $3.00 per day while occupied in the discharge of their duties in the letting out, inspecting and accepting, building, or repairing of any county bridge or county building or works, and five cents per mile for each mile necessarily traveled by them in so doing, said sums to be paid on warrants drawn on the county treasurer on the order of the court of county commissioners or board of revenue. No allowance shall be made to any commissioner for per diem or mileage for inspecting roads, bridges, etc., except when acting under authority of an order of the commissioners' court previously made. Provided however, that in cases of emergency and when necessity demands it shall be permissible for any member of the commissioners court or board of revenue to make inspections of roads and bridges and that such member shall be allowed his per diem and mileage on proof being made by such member to the court of county commissioners or boards of revenue that such emergency existed, and by filing a certified, itemized, statement of the amount of time spent and mileage traveled in making such inspection. Provided this shall not apply to counties in which the compensation of the members of the

governing body of the county is fixed by local law or to any county having a population of as much as sixty thousand according to the last or any succeeding Federal Census."

It will be noted that the members are to be paid for "their services" "while occupied in the discharge of their duties as such members of the Court" and "five cents per mile in going to and returning from their respective courts".

The conclusion seems inescapable that if, as the above cited cases hold, the court can hold adjourned meetings, that the members are entitled to their per diem and mileage "while occupied in the discharge of their duties as members of such court," whether meeting in regular, adjourned or special term.

The opinion cited above so far as they hold otherwise and any other former opinions holding contrary to this, are expressly overruled.

The number and necessity of adjourned terms, is a matter which necessarily addresses itself to the Court, charged as it is with the management of the affairs of the particular county, and when such terms are held the members are entitled to their per diem and mileage.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 20, 1936

Hon. E. C. Glover,
Tax Collector, Henry County,
Abbeville, Alabama.

Tax Collector - Vacancy in office:

1. When there is a vacancy in office of Tax Collector of the County, such vacancy must be filled by the appointment of some person by the Governor.

2. When a person is appointed by the Governor to fill a vacancy in the office of County Tax Collector, such person holds the office for the unexpired term and until his successor is elected and qualified.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of January 8, 1936, which follows:

"I was appointed by Governor Graves to the office of Tax Collector for Henry County for the term commencing October 1, 1935, on default of bond being made by Hon. R. L. McLendon, as required by law and who had been elected for this term.

"Now, will this office have to be filled by election in the coming 1936 election? Or doees the appointment hold for four full years commencing from the date of my appointment on October 1, 1935?

"An opinion from you clearing this matter will be greatly appreciated. As you see, the public interest is concerned in this matter."

In answer to the question raised in your letter, I wish to advise that when there is a vacancy in the office of Tax Collector of a County, such

vacancy must be filled by appointment of some person by the Governor of the State of Alabama and that when a person is appointed by the Governor to fill a vacancy in the office of County Tax Collector, such person holds the office for the unexpired term and until his successor is elected and qualified.

Under the facts stated in your letter, you were appointed Tax Collector for Henry County for the term commencing October 1, 1935, and ending September 30, 1939. Under the law, you hold office for the unexpired term, which in this case is until September 30, 1939, and until your successor is elected and qualified.

I call your attention to an opinion of this office addressed to Mr. F. A. Walker, Chairman, Russell County, Democratic Executive Committee, Hurtsboro, Alabama under date of February 16, 1932, which is found in the Biennial Report of the Attorney General 1930-1932, at page 706. The question raised in your letter of inquiry is there dealt with in full, and this opinion is written in conformity therewith.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 20, 1936

Hon. W. R. Carothers,
Superintendent of Education,
Marion, Perry County, Alabama.

County Superintendent of Education --

Present incumbent qualified to seek position in Perry County at election to be held in 1936, under Local Acts 1931, page 146.

Opinion by Assistant Attorney General Lawson.

Dear Sir:

This is to acknowledge receipt of your recent letters wherein you request an opinion of this office as to whether or not you are qualified to become a candidate for Superintendent of Education of Perry County, Alabama, under the provisions of Act No. 301, approved June 26, 1931 (Local Acts 1931, p. 146). You state that you have been for a number of years Superintendent of Education of Perry County; that you came into possession of the office first by virtue of the appointment of the County Board of Education of Perry County, Alabama, and that for several successive terms you have held such office. You further state that you are at the present time Superintendent of Education by virtue of the fact that you were elected to that office by the qualified electors of Perry County, under the provisions of the said 1931 Act supra. You further state that you possess an Alabama certificate in administration and supervision based upon graduation from the University of Alabama, from which school you received a Master Degree. You state that you desire my opinion as to whether or not you can be a candidate for said office under the provisions of the 1931 Act, due to the fact that your right to be such a candidate has been questioned, and that it is alleged that Section 7 of said Act prevents you from becoming a candidate.

You state further that it is contended by certain parties that while you were exempt from possessing the qualifications set out in said Section, supra, if you had sought the office in the 1932 election, that you are no longer exempt from possessing said qualifications, and that you do not possess the

qualifications to become a candidate in the next election, because of the fact that you have not had three years teaching experience during the five years next preceding the election.

Section 7 of the 1931 Act, is in words and figures as follows:

"Section 7. That no person can become a candidate for said office of Superintendent of Education of said County, unless said person shall possess the following qualifications, as fixed by the General Laws of the State of Alabama, viz: Such candidate shall hold an Alabama certificate in Administration and Supervision based as a minimum upon graduation from a Standard Normal School or equivalent education, with at least one year of additional study of college grade and proof of three years successful teaching experience during the five years next preceding his election; that the provisions of this Section shall not apply to the County Superintendent of Education now in office, should he desire to become a candidate for said office, in the year 1932."

It will be noted that the qualifications set out above in Section 7 of the 1931 Local Act, are practically identical with the qualifications required of those persons who seek to become county superintendents of education under the general law, which qualifications are prescribed by Section 139, School Code of 1927, which section is as follows:

"139. Qualifications of County Superintendent.--

No person shall be eligible for appointment by any County Board of Education or for political party nomination or for election to the office of County Superintendent of Education of any County, who does not as now required hold an Alabama certificate in administration and supervision based as a minimum upon graduation from a standard normal school or equivalent education, with at least one year of additional study of college grade and proof of three years of successful teaching experience next preceding his appointment; provided that the provisions of this section shall not apply to County Superintendents of Education in office on October 1, 1932. A County Superintendent of Education need not be a qualified elector of the County in which he serves."

It appears, therefore, that, after the passage of the 1931 Local Act, any person who desires to become County Superintendent of Education of Perry County, is required to possess qualifications of two separate and distinct classes: First, that the aspirant should have certain educational qualifications and a certificate in administration and supervision; Second that such aspirant should make proof of three years successful teaching experience during the five years next preceding his election. It was provided, however, that the qualifications above set out should not apply to the County Superintendent of Education now in office should he desire to become a candidate for said office, in the year 1932.

I am of the opinion that the provisions of said section, supra, do not prevent you from becoming a candidate for re-election to the office which you now hold.

In arriving at this conclusion, I have not passed on the question as to whether or not the Legislature intended the words "in the year 1932" to be construed as descriptive of the election to be held, or as a limitation on the right of the incumbent to seek such office in the event he did not possess the qualifications set out in said Section 7 of the 1931 Act, supra.

You possess all the educational qualifications according to the information which has been presented to me. That is, you possess a certificate in administration and supervision issued by the proper school authorities, and you are a graduate of the University of Alabama. While it is true that you have not taught school for three years out of the five years last preceding the date of the election, I do not think that the Legislature intended for such qualifications to required of any person who was at the time of the election then serving as Superintendent of Education. If I were to hold that you do not possess the qualifications to become a candidate because of the fact that you have not been teaching school for the required number of years next preceding then in that event the person who was elected could hold said office for only four years and could not become a candidate to succeed himself. I do not think that the Legislature intended that the law should be so construed. If it had intended that the County Superintendent of Education could not succeed himself, such limitation very easily could have been written into the law. I am constrained to hold that you are entitled to become a candidate, because to hold otherwise would, in effect, say that, under the general law as provided in Section 139 of the School Code of 1927, no County Superintendent of Education could be reappointed by the County Board of Education.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 20, 1936

Hon. A. H. Glasgow,
Judge of Probate,
Cleburne County,
Heflin, Alabama.

1. Statutes - Acts 1935, p. 780 and p. 781, held constitutional.

2. Gas Tax - Gasoline excise tax funds may be consolidated with the general fund of the county but may not be earmarked to pay commissioners' court.

3. Probate Judges - Judge of Probate of Cleburne County entitle to collect $400 per annum road ex officio fees.

4. Welfare Department - Cleburne County authorized to use certain funds for payment of welfare workers' salaries.

5. Pauper's Homes - Pauper's Home may be abolished in accordance with the terms of Acts 1935, p. 762.

6. County Treasurer - Cleburne County authorized to abolish office of County Treasurer, in absence of legislation to the contrary.

7. County Warrants - Cleburne County compelled to issue refunding warrants for outstanding warrants.

Opinion by Assistant Attorney General Small.

Dear Sir:

You request my opinion as follows:

"Herewith enclosed please find copy of two Acts that were passed and approved a few days before the Legislature adjourned.

"I would like for you to give me your opinion and answer to the following:

"1. Does either of said Acts violate any Section of the Constitution?

"2. Can we pay each member of the Commissioners Court out of gasoline excise tax funds that the County receives from the State?

"3. If there are no warrants outstanding against the gasoline tax fund that the county receives from the Sate; when the Commissioners Court meets, can it transfer to the General Fund of the County such part of the gasoline excise tax that it has received from the State for the preceeding month, and use it as it would other General funds?

"4. The net annual compensation in the Judge of Probate's office in Cleburne County is less than $5,000, I would like to know the amount that I could collect for Road Ex Officio fees?

"5. Can Cleburne County use any money that it has in the general fund of the County for welfare work, and the maximum amount that we can use and any other funds that we can use, and manner of payment?

"6. We have a Pauper's home and would like to dispose of it, and make other arrangements to take care of our Paupers, and would like to know if we can board them in private homes, and the maximum amount that we could pay for each Pauper's board and upkeep?

"7. Can Cleburne County designate Bank of Heflin as County Depository and not use a County Treasurer?

"8. Is it compulsory for Cleburne County to issue refunding warrants for outstanding warrants?"

In reply, I have decided to answer your questions consecutively.

Your first question, as far as it concerns Senate Bill 377-Cook (Acts 1935 p. 780) is answered in an opinion to Hon. Winston Stewart, Judge of Probate of Coosa County under date of January 23, 1935, copy of which is attached hereto.

Considering your question concerning Senate Bill 279-Cook (Acts 1935, p. 781) which you enclose, my answer must necessarily be qualified. This bill purports to transfer "any funds (except school monies and sinking funds) that may be received by the county, to the general fund of the county .. . ."

In my judgment, the legislature cannot authorize the Court of County Commissioners to transfer road and bridge funds received from the levy of the two and one-half mill tax authorized by Section 215 of the Constitution which provides as follows:

"No county shall be authorized to levy a greater rate of taxation in any one year on the value of the taxable property therein than one-half of one per centum; provided, that to pay debts existing on the sixth day of December, eighteen hundred and seventy-five, and additional rate of one-fourth of one per centum may be levied and collected which shall be appropriated exclusively to the payment of such debts and the interest thereon; provided, further, that to pay any debt or liability now existing against any county, incurred for the erection, construction, or maintenance of the necessary public buildings or bridges or that may hereafter be created for the erection of necessary public buildings, bridges, or

roads, any county may levy and collect such special taxes not to exceed one-fourth of one per centum, as may have been or may hereafter be authorized by law,**which taxes so levied and collected shall be applied exclusively to the purposes for which the same were levied and collected.**"

You will note that the last sentence of this section provides that taxes here provided for **shall be applied exclusively to the purposes for which the same were so levied and collected.**

In my judgment, the Road and Bridge Fund, above referred to, cannot by the terms of this Act be transferred to the general fund, and as to this particular fund, Senate Bill 379—Cooke (Acts 1935, p. 781) is wholly inoperative. I find no constitutional objection, however, to the transfer of other funds contemplated by the Act, and of which the legislature has the power to authorize a transfer.

I must answer your second question subject to certain qualifications. You ask if you can pay your County Commissioners with the funds received by the county from the State, which are derived from the gasoline excise tax funds.

Under the terms of Senate Bill 379 - Cooke (Acts 1935, p. 781), the funds in question become a part of the general fund at the time the gasoline excise fund is abolished and the funds so received are deposited in the general fund. From the time that these funds are consolidated, the gasoline tax fund loses its identity as such and can no longer be "earmarked" to retain its identity. It is my opinion, therefore, that the excise tax on gasoline cannot be earmarked and used for any purposes other than those enumerated in the General Revenue Act, H. B. 324, Schedule 156.11, page 321 as follows:

"***and the other one-half of said 1-3 shall be divided equally among the 67 counties of the State of Alabama, monthly as collected, less the cost of collection, payment to be made to the County Treasurer or Depository of said counties on or before the 10th day of each month of the year, **and said funds shall be used by the several counties of the State exclusively for the construction, maintenance, supervision and policing of the public roads and bridges in the respective counties;** provided, however, that the Board of Revenue or other such governing body of a county may direct the State Tax Commission to pay over to the State Highway Department such part of said funds as may be agreed upon by the Board of Revenue or such other governing body of any county, and the Governor of the State of Alabama, which said funds are to be used in the construction and maintenance of roads in said county, to be agreed upon by the Board of Revenue of such county, or such other governing body, and the Governor of the State of Alabama."

In answer to your third question, I wish to advise that in my opinion, as set out in the answer to your second question, the gasoline tax funds lose their identity as such when put into the general fund, and, of course, the general fund's expenditures are governed by law.

My answer to your fourth question, with regard to what amount the Judge of Probate of Cleburne County, whose net annual compensation is less than $5,000, may receive for Road Ex Officio fees, is found in Section 7285 of the Code of 1923 as follows:

"7285. Fees allowed to judges of probate. -

Judges of probate are entitled to the following fees for the following services:

"Discharging his duties in relation to public roads, on proof to the county commissioners that he has discharged such duties, annually, to be paid out of the county treasury, not exceeding . . . . . $400.00."

In reply to your 5th question, I wish to refer you to Senate Bill 365-Walton (Acts 1935, p. 762). Section 11 of this Act provides in part as follows:

"Members of the County Board shall serve without compensation for their services as members but shall be reimbursed out of the general funds of the County for the amount of their traveling and other expenses actually paid out while in attendance at the meeting of the County Board."

Section 12 of this Act provides in part as follows:

"The salary of the County Director shall be fixed by the County Board in conformity with the salary schedule as prescribed by the State Board."

Section 14 of this Act provides in part as follows:

"The salaries of the staff shall be fixed by the County Board in conformity with the salary schedule prescribed by the State Board. Adequate traveling expenses for the County Director and his staff while in performance of their duties shall be fixed by the County Board in conference with the County Director. The County Board of Revenue, Court of County Commissioners, or other governing body of the County and incorporated municipalities within the County shall make joint appropriations for office space, supplies, and for the maintenance of the functions to be performed by the County Department of the Public Welfare, and shall mutually participate in the benefits thereof, but the amount to be appropriated by said governing body of the County and by each municipality shall be subject to the approval of the said governing body of the County and the participating municipality or municipalities. When federal and State funds are available for use by County Boards, they shall be allocated by the State Board. Due consideration shall be given in the allocation of these funds to population, extent of need and the financial conditions of the County."

From the above quoted provisions of this Act, I am of the opinion that the county governing body is authorized to appropriate funds in accordance with the terms thereof for welfare work. I find no provisions for a maximum and minimum amount or for the manner of payment set out in the Act, supra.

In reply to your question numbered 6, wish to advise that the Acts of 1931, page 749, provides as follows:

"That Section 31 of an Act of the Legislature, approved September 9, 1927, entitled an Act to provide for and regulate further the care, support and maintenance of the poor and paupers of the several counties of the State of Alabama, be amended so as to read as follows: Sec. 31. A home having been established in any county or district, all persons eligible to admission, who from any cause are unable to support and provide for themselves, and who have no one to care, support or provide for them, and are, or are likely to become, a charge upon the County, shall be committed to said home, and the Court of County Commissioners, or Board of Revenue, cannot appropriate any money for the support of paupers outside such home, except in cases as provided for by provisions of this Act. After September 30th, 1929 the Court of County Com-

missioners, or Board of Revenue of a county cannot appropriate money from the public funds for the support or maintenance of a pauper who is not an inmate of a County or district home, except in case of emergency, as provided for elsewhere in this Act, and in case of temporary relief on account of illness, such relief cannot be extended beyond a reasonable length of time. Provided that where there is no established home for paupers or indigents, nor a County poor house in a County, or such home for paupers or indigents of County poor house is not of sufficient capacity to receive and house comfortably those persons in the County who, on account of indigency, are worthy charges upon the County to support, the Court of County Commissioners, Board of Revenue or like governing body of the County shall be authorized and empowered to arrange for the care and support of such indigent persons or paupers outside of the poor house or home for indigents at a sum for each pauper or indigent person not exceeding eight dollars per month. To provide that the provisions of this bill shall not apply to counties having a population of 60,000 or more according to the last or any subsequent Federal census. This act shall not repeal any local or special law."

It will be observed that the provisions of this Act are very specific, stating that the "Board of Revenue of a county cannot appropriate public funds for the support or maintenance of a pauper who is not an inmate of a county or district home, except in case of emergency, as provided for elsewhere in this Act.***"

From this language it is clear that the county has no authority to abolish an almshouse and provide for its paupers elsewhere. These provisions of the law must control unless repealed by some later legislation.

Senate Bill 365-Walton (Acts 1935, p. 762) provides in part as follows:

"Section 8. The aim of the State Department shall be the promotion of a unified development of the Welfare activities and agencies of the State and of the local governments so that each agency and each governmental institution shall function as an integral part of a general system. **In order to carry out effectively these aims it shall be the duty and responsibility of the State Department to: (1) Administer or supervise all forms of public assistance including general home relief, outdoor and indoor care for persons in need of assistance,** and old age pensions, also including those duties that have to do primarily with the determination of need and authorization of relief now performed by the Alabama Relief Administration. ***"

In my opinion the effect of the provisions of Senate Bill 365-Walton, Supra, is to repeal the 1931 Act insofar as conflicts exist. Administration of all forms of public assistance by provision of Senate Bill 365-Walton, Supra, has been placed in the State Dapartment of Welfare. This bill further specifically provides that "the aim of the State Department shall be the promotion of a unified development of the Welfare activities and agencies of the State and all the local governments shall with each agency and **each governmental institution** so function as an integral part of a general system."

In my opinion county almshouses are included in this provision since they are "governmental institutions" for the purposes of relief of indigent persons in a county; and the administration of public assistance in a county has been transferred to the State Deparment of Welfare.

It is, therefore, my opinion that the governing body of Cleburne County has authority to abolish its almshouse, only with the approval of the State Department of Public Welfare.

The opinion reported in the Biennial Report of the Attorney General 1930-1932, page 953, is hereby overruled.

Question seven should be answered in the affirmative. I call your attention to Article II, Code of 1923 and especially to Section 312 thereof, which reads as follows:

> "312. Office of county treasurer abolished.--
> The office of county treasurer is abolished in all counties having a population of not more than fifty-five thousand according to the last Federal census or any subsequent Federal census, except as otherwise provided by statute, local or general."

This answer is based upon the assumption that no legislation exists local or otherwise, providing for a county treasurer of Cleburne County, I further refer you to the case of State vs. Bugg, 196 Ala. 460, 71 So. 699.

In this connection, I wish to call your attention to Section 316 of the Code of 1923 which provides for the designation of County Depositories as follows:

> " Depositories, how selected.-- The board of revenue or court of county commissioners shall from sealed bids place the county funds, the bids being opened on the first Monday in December of each year, with such incorporated state or national bank in the several counties, as offers the highest rate of interest to the county on daily balances of bank deposits, such placing of said county funds to be for the period of the following calendar year."

In reply to your eighth question, I refer you to opinions of this office rendered to the Hon. Coma Garrett, Judge of Probate of Clarke County on October 25, 1935 and November 16, 1935, and to opinions rendered to the Hon. Frank M. Johnson, Judge of Probate of Winston County dated November 18, 1935 and to Hon. H. W. Clayton, Clerk of the Circuit Court of Marshall County, Guntersville, Alabama copies of which opinions will be found in the Quarterly Report of the Attorney General for the period from October 1, 1935 through December 31, 1935.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 20, 1936

Hon. W. W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Attention of Mr. Simon Wampold, Chief Clerk.

Taxation - Redemption

(1) Partial redemption. Partial redemption may be made where land sold for taxes is purchased by individual.

(2) Rate of interest where redemption from individual:

(a) Where sale was made prior to approval of Act No. 20, approved June 15, 1932, the rate is governed by Section 3110 of the Code and is 15%.

(b) When sale was subsequent to September 15, 1932, rate is governed by said Act No. 20, and is 8%.

(c) When sale occurs subsequent to October 1, 1935, the rate is governed by the Revenue Act of 1935 and is 6%.

(3) Where certificate of sale made to the State is assigned to individual, such individual assignee's rights are the same as if he had been the purchaser at the sale.

(4) Where partial redemption is made from individual, or where certificate of State has been assigned to individual, it is not necessary for the Probate Judge to submit the application to the State Bond Commissioner.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of January 16, 1936 addressed to Mr. Frontis H. Moore, in which you state:

"As per our conversation, I am submitting the proposition of redemption that we were discussing, and while I am not asking for an official opinion, yet I would appreciate very much if you would give me the results of your conclusion.

"John Smith's property is sold for taxes and bought in by the State of Alabama. Shortly after the Alabama National Bank purchases this certificate from the State Land Department. Does this sale then become an individual sale or does the Alabama National Bank simply stand in the shoes of the State of Alabama?

"Later on it develops that the Federal Land Bank has a mortgage on two-thirds of this property and wants to redeem only that part on which they have a mortgage. Can this office make this redemption without the consent of the Alabama National Bank or the State of Alabama? The Code sets out that any partial redemptions where property is sold to the State must be submitted to the Land Department before the Probate Judge can make the redemption, but does not make any provisions for partial redemptions where the individual is concerned.

"On individual sales interest was charged at the rate of 8% on all sales and on all subsequent taxes. This also applied to State sales but the 1935 Legislature made provisions relieving the delinquent taxpayer on any sale from 1931 to 1935 of all interest. Can the Legislature take away the individual rights?

"It seems that the whole proposition boils down to whether or not a person buying a tax certificate from the State for the sale makes the sale an individual sale or places him in the position of the State of Alabama.

"This is rather an interesting proposition and I would appreciate it if when you have time, you would go into it and let me hear from you."

Answering you, I call to your attention the following provisions of the Revenue Act. Section 225 provides for the assignment of the certificate of purchase by the State upon certain conditions. Section 241 provides for the delivery by the Judge of Probate of a deed "to a purchaser other than the state or person to whom the certificate of purchase has been assigned." Section 268 provides in part: "Real Estate which hereafter may be sold for taxes and purchased by the State may be redeemed **at any time before the title passes out of the State,** or if purchased by any other purchaser may be redeemed at any time within three years from the date of the sale *** and such redemption may be of any part of the land so sold, which includes the whole of the interest of the redemptioner." Section 282, while applying to lands which have been bought in by the State at tax sale and sold by the State, has I think a general bearing on this subject as indicating that the transferee or the purchaser has all the rights that an individual would have had had he been the purchaser at the tax collector's sale.

It, therefore, would follow that where land has been sold to the State at tax sale and the certificate of sale assigned to an individual, such individual occupies, so far as the redemption statute is concerned, identically the same position that he would occupy had he been the purchaser at the tax sale, and all provisions applying to purchasers other than the State, apply to such individual who has been assigned the certificate of sale.

Applying this conclusion, Section 273 makes it very clear that it is not necessary in a case such as is submitted by you for the redemption to be submitted to the approval of the State Land Commissioner, the last three lines of Section 273 specifically stating:

> "Where the land sought to be redeemed has been purchased by an individual and not by the State it shall not be necessary to submit the matter to the State Land Commissioner."

It is, however, clearly provided by Section 268 above quoted and by Sections 271 et seq. that partial redemptions apply in cases where land has been sold to an individual as well as to the State.

The question then arises, what rate of interest is chargeable? Formerly Section 3110 of the Code provided for interest or penalty of 15% upon redemption. This was changed by Act approved September 15, 1932, making the rate of interest 8%. As you know, this was further changed by the new Revenue Bill to make the rate of interest 6%. However, as you will note in the recent opinion to Judge Hawkins, which was sent to you, it was stated; "On the other hand, where private individuals have purchased land at tax sales, they acquire the property subject to the conditions which the law imposes at the time of the sale and their rights are filed and become vested thereby. The legislature cannot, as held by the former Attorney General, thereafter change the amount to which an individual purchaser at a tax sale is entitled upon redemption." The opinion referred to was that of February 17, 1933 addressed to the Hon. W. W. Brandon, Judge of Probate, Tuscaloosa County, Office Edition Book 13 page 178. In this opinion, on this particular question, it was stated:

> "In my opinion, where lands were sold for the payment of taxes and bought in by an individual other than the State prior to September 15, 1932, the date of the approval of said Act No. 20, such individual acquires a vested right in the property so purchased such that it could

not be redeemed otherwise than the law provided at the date of sale. Any subsequent statute to the contrary would be unconstitutional. Besides there is no Act to the contrary. Said Act No. 20 so provides."

Continuing the discussion, it was stated that where a tax sale was held after September 15th, the redemption of the property is governed by Act No. 20, approved September 15, 1932. Therefore, if the sale was made to an individual or if the sale was made prior to September 15, 1932 and transferred to an individual prior to that date, the interest rate on redemption is 15%. If the sale was made between September 15, 1932 and October 1, 1935, and said sale was made to an individual, the interest rate on redemption would be 8%, and the same would apply where the sale was made to the State and the certificate of sale was assigned to an individual. Any sale made subsequent to October 1, 1935 would carry a rate of 6% on redemption whether such sale was made to an individual or to the State. My conclusion of your last specified question, gathered from the whole Act, is that a person buying a tax certificate from the State so far as redemption is concerned, occupies the same place as if such person had been the purchaser at the original tax sale.

I do though wish to call your attention to this paragraph of your letter: "On individual sales, interest was charged at the rate of 8% on all sales, and on all subsequent taxes. This also applied to State sales, but the 1935 Legislature made provisions relieving the delinquent taxpayer on any sale from 1931 to 1935 of all interest. Can the Legislature take away the individual rights?"

I do not so read Section 291, and the opinion to Judge Hawkins holds that it applies only to sales made to the State and the whole theory of the opinion is that the State is in possession of the property and the Legislature can do what it chooses with its own. As above quoted, it was specifically stated that it did not apply to individuals, and the opinion to Judge Brandon was referred to as authority.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 21, 1936.

Dr. H. G. Camp,
Physician-Inspector,
Board of Administration,
CAPITOL.

Sheriffs. Feed Bills—

The sheriff in making out his feed bill for caring for prisoners must itemize same and show the amount of food, the number of prisoners, the sex of the prisoners, when incarcerated and when released, and failing to do this, those charged with the duty of paying are without authority to pay same.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of January 30, 1936, in which you request my opinion as follows:

"Attention is directed to Section 4834 of the Code, and an Act to Regulate the Feeding of Prisoners as amended and approved September 6th, 1927, requiring the sheriff to keep on file invoices and supporting papers of all foodstuffs purchased as provided etc.

"In the course of an examination of the sheriff's feeding account when the sheriff can produce no invoices, receipted bills or supporting papers to sustain fully the items of expenditure which the sheriff has set forth in the itemized statement of foodstuffs furnished under the law to the Physician-Inspector, Court of County Commissioners etc.

"Compilation of the average for the whole state of the daily per capita cost in all of the jails is compiled by this office. In the absence of the above mentioned invoices, is it permissible for my Examiner to allow the sheriff the State's average per capita cost?

"The sheriff has fed the prisoners and it would seem is entitled to some remuneration, although he has not kept invoices. If the State's average per capita cost can not be allowed, what basis should the Examiner use in auditing these accounts?"

I find no law that can authorize you to apply the law of averages when it comes to allowing claims of sheriffs for feeding prisoners. The statute says that before these claims are paid the sheriff or jailer must furnish the court of county commissioners, Boards of Revenue or State Auditor, as the case may be, certain data as set out by Section 6 of an Act approved September 6, 1927 (General Acts 1927) which is as follows:

"Section 6. On or before the tenth day of each and every month the sheriff of each county shall furnish to the Court of County Commissioners, or Board of Revenue, as the case may be, to the State Auditor, and to the State Prison Inspector, an itemized statement in detail, verified by affidavit, giving a list of all state and county prisoners, by name, race and sex, the offense charged, authority for committing, disposition of prisoner, if sentenced, date discharged, the number of days in jail. The sheriff shall set out the amount of money actually expended for purchasing and supplying of all foodstuffs for feeding prisoners during the month immediately preceeding."

The account must contain an itemized statement of the amount fed to the inmates of the prison, etc. It is the duty of the sheriff to procure statements as to his purchases of food, so that he can at the end of each month make out his account for feeding prisoners, according to law. If he fails to do this, the Auditor should refuse to pay same. The law says this must be done and does not say in case he fails, then it is the duty of the Auditor, or those charged with the duty of passing on these claims to find the general average and pay him according to this.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 21, 1936.

Dr. J. N. Baker,
State Health Officer,
Department of Public Health,
Montgomery, Alabama.

Dead bodies—Board for distribution of dead bodies, created by Code of 1928, Section 1288 et seq., has power to designate the type of School to which such distribution may be made.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"Attached hereto is a copy of the minutes of a recent meeting of the Board for the Distribution and Delivery of Dead Bodies as created by the Legislature, together with certain correspondence pertaining to the authority vested in this Board.

"It will be seen, from the recorded minutes of the Board meeting, this Board was of the opinion that under Sections 1288-1297 of the statutes, it was without authority to grant or deliver unclaimed dead human bodies to any institution other than existing medical schools as recognized by the Association of American Medical Colleges.

"This Board will appreciate being advised, from the legal point of view, as to the correctness of its construction of these sections of the Code."

In my opinion, the Board established by Section 1288 of the Code of 1928 (Acts 1923, p. 381, Article 1) has, under Section 1289 of the Code of 1928, full power and authority to establish and enforce rules and regulations, not inconsistent with the statute, for the distribution and delivery of dead bodies to schools for scientific study.

It will be noted that the statute (Code of 1928, Sec. 1293) does not limit the type of school to which such dead bodies may be furnished. It leaves the matter entirely to the judgment and discretion of the Board. This was probably done by the Legislature in view of the fact that it had provided, as members of the Board, officials who are peculiarly fitted to decide the question. Of course, the Legislature in the enactment of these statutes, primarily intended to provide a source of material for medical schools, but, under the general powers given, the Board might properly authorize the allocation of such bodies to any school requiring the same for scientific study. The question addresses itself to the sound judgment of the Board.

It must not be understood from this conclusion that I am undertaking to express an opinion as to the wisdom of limiting the distribution of such bodies to medical schools approved or recognized by the Association of American Medical Colleges. If, in the judgment of the Board, distribution should be limited to such recognized medical schools and a rule or regulation thereon is adopted or enforced, no one can complain that such a rule is arbitrary and not within the powers of the Board.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 21, 1936.

Hon. Gaston Scott, President,
Highway Commission,
Capitol.

Highways—

State Highway Commission under facts stated, has no authority to drop roads from the State Road System.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge recipt of your letter of December 16, 1935, in which you state:

"The State Highway Department of Alabama built roads in Chilton County with proceeds from the Second Bond Issue as authorized by the Legislature."

You request my opinion:

"The Commission wishes to know whether it has the authority to drop the above mentioned roads from the State System so the State Highway Department will no longer be required to maintain same. As long as said roads are on the State road system it is the duty of the State Highway Department to maintain same."

In my opinion your question should be answered in the negative. When the State built the roads as outlined in your letter, there was an implied contract that the roads would be kept in repair and maintained by the State Highway Department. Of course, the State might abandon the roads, but I have been unable to find any authority for the State Highway Department to force the County to take over the abandoned roads and maintain the same.

The modern tendency is for the State to take over all of the county roads instead of placing additional roads under the jurisdiction of the counties.

In the case of Godwin v. Board of Supervisors of Nansemond County 171 S. E. p. 521 (Supreme Court of Appeals of Virginia, 1933) the Court said:

"This power of the state over county roads was for a long time seldom exercised. Counties built and maintained them, but it was a wasteful system and unsuited to modern conditions. In 1906 (Acts 1906, c. 73, p. 71) a state highway commissioner was appointed who was given general supervision over their construction and maintenance.

"In 1918 (Acts 1918, c. 10, p. 9), provision was made for a state highway system, which system included most of our main-traveled roads. Secondary roads were not, however, taken in, but remained under local authorities. This situation was continued until the passage of the act of 1932, when they also were taken over by the state; and so, by progressive legislation, counties have been entirely relieved of this major drain upon their resources."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 21, 1936.

Hon. Geo. O. Miller,
Member House of Representatives,
Sumter County,
Livingston, Alabama.

Licenses—Chain Store—

Under facts set out, parties held liable for license levied by Article 13, chapter 3, known as the Chain Store License.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of January 2, 1936, in which you state:

"Will you please advise me whether a firm operating an automobile sales agency, garage and parts division and selling gas and oil is liable for a store license. Also whether said automobile agency operating a branch agency in another town would be liable for a chain store license.

"Also whether a cafe selling bottle drinks, cigarettes, and has a few boxes of chewing gum and candy is liable for the store license. Also whether the same man renting and operating a gas and oil business in a different section of the same town where the cafe is located, and in which he also operates a lunch counter, would be liable for the chain store license."

In reply, I advise that Schedule 155.7 of the Revenue Act of 1935 provides in part:

"The term 'store' as used in this schedule shall be construed to mean and include any store or stores or any mercantile establishment or establishments which are owned, operated, maintained, controlled, or for which the buying is done by the same person, firm, corporation, copartnership or association, either domestic or foreign, in which goods, wares or merchandise of any kind are sold, either at retail or wholesale."

It would appear from the foregoing definition that, under both statements of facts set out by you, there is selling of goods, wares or merchandise and that there is unity of ownership or control. I am, therefore, of the opinion that in both cases set out by you, there is liability for the license levied by Article 13, Chapter 3 of the Revenue Act of 1935. See opinion to Hon. C. B. Gullatt, Jr., Probate Judge of Russell County, dated October 17, 1935, found in Office Edition, Book 7-A, p. 152.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 21, 1936.

Hon. W. M. Vaughn,
Judge of Probate,
Dallas County,
Selma, Alabama.

Taxation—Land Agents.

1. Compensation of land agents payable out of total "proceeds" of redemption money, under McDermott Act (Act No. 440 approved Sept. 13. 1935).

2. Opinion to Hon. W. W. Hill, Probate Judge of Montgomery County, Dated Dec. 3, 1935, holding compensation of land agent payable by Judge of Probate, approved.

3. Municipal taxes not properly included in decree of sale, and not part of "proceeds" upon redemption.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter addressed to Mr. Frontis H. Moore in which you state:

"Mr. Carlton has just sent me an opinion which you recently gave the State Tax Commission in regard to House Bill 1048 which authorized the appointment of a Land Agent by the Tax Commission and provided for his remuneration.

"I had not seen your opinion prior to writing the Tax Commission that I would not pay said Agent. But in view of your opinion and particularly that part of it which is as follows:

'The statute is silent as to how the compensation is to be paid, but it does provide that it shall be paid from the funds so received. As the Probate Judge receives moneys paid in on redemption, presumably he should pay the land agent the commissions before remitting.'

"I desire to call your attention to several questions before any actual conflict arises between some of the Probate Judges and said Land Agents, with the hope that matters may be clearly understood by both sides at the outset.

"1. The contract is made by the Chairman of the Tax Commission with the land agent, and the commission is agreed upon between them. Under Section 2 of said Act isn't it clear that the entire 10 per cent shall be paid by the State (with whom he made his contract) from the funds so received (by the State)?

"2. Is there any authority of law whereby under any such contract the **Probate Judge** could **legally** deduct from any money due the **Board of Education** for any such commissions?

"3. Under Sec. 215 of the Constitution one-fourth of one per cent is levied and collected **exclusively** for road and bridge purposes. Could a deduction be made from such fund to pay said **commissions?**

"The same applies to the amount due the City School Fund, where a special tax is levied in Selma for schools and collected by the County Tax Collector.

"I have heretofore been notified by the counsel for the County School Board that I would be held responsible for any deductions made on account of such commissions.

"All of these matters arose during the last administration and after much correspondence and argument pro and con, the entire matter was dropped. As I can see new troubles just ahead, I would thank you to look into this matter in your usual careful manner and let me hear from you."

Assuming that you desire a formal opinion on these questions, I advise you as follows:

1. The Act in question (No. 440 H. B. 1048 approved September 13, 1935) provides:

"Section 1. The State Land Commissioner, with the approval of the Governor, may contract with some person or firm in each county of this State to investigate sales of real property for taxes and bid in for the State, to notify parties at interest in such real estate of such sales, to secure redemptions of said property, to secure sales of said property subject to sale at private sale by the State.

"Section 2. For such services rendered under the preceding section, the State Land Commissioner may allow fair compensation, to be fixed in the contract, which shall not exceed 10 per cent of the proceeds of such rent, sale or redemption, and shall be paid from the funds so received.

"Section 3. All laws and parts of laws in conflict herewith are hereby expressly repealed.

Section 4. This Act shall go into effect immediately upon its passage.

"Approved September 13, 1935."

It is to be noted that the Act applies only in cases where lands have been sold to the State.

Section 2 provides for the compensation of the Land Agent "which shall not exceed 10 per cent of the proceeds of such rent, sale or redemption, and shall be paid from the funds so received.

I think the opinion to Judge Hill, to which you referred answers your first question. However, I call to your attention opinion to Hon. Eugene H. Hawkins, Probate Judge of Jefferson County, dated November 22, 1935. I held, inter alia:

"Presuming a valid sale, and any discussion is necessarily made upon the hypothesis of a valid sale, the State has foreclosed its lien and the judgment which includes the tax is satisfied and the title to the property passes to the State absolutely."

And on page 5 of said opinion, it was stated:

"After the sale to the State there can be no new assessment or tax liability. While the amounts required to be paid upon redemption for the years subsequent to the sale are loosely termed annual taxes, such terminology is merely one of convenience, to describe the annual **amounts** which the Legislature has declared shall be paid. The fact that the Legislature has endeavored to have such amounts approximate what the annual taxes would have been if the property had been individually owned, does not convert such 'amounts' into 'taxes' or the annual valuations provided by the statutes into 'assessments.' "

From this, it appears that the amounts payable on redemption are not strictly taxes, and are subject to such distinction and disposal as the Legislature may make.

Even treating the amounts received as taxes, however it would appear that the rule laid down in **Shaver v. Robinson, 59 Ala.** 195 and approved in **Jefferson County v. City of Birmingham,** 221 Ala. 476 (129 So. 48,) in **City of Birmingham v. So. Express Co.** 164 Ala. 529. (51 So. 159) and **State v. Jefferson Co.** 17 Ala. App. 460, 86 So. 88, 204 Ala. 393, 86 So. 89, cited in opinion to Hon. R. E. King, Tax Collector of Mobile County, under date of January 11,

1935, holding that taxes can be charged with the expenses of assessment and collection, would authorize the payment of reasonable compensation to the land agent, such being a part of the expenses of collection, just as is the amount the Probate Judge receives for his services. What amount is reasonable is a legislative question.

The compensation being based upon the "proceeds' and upon redemption, such proceeds, being payable to the Judge of Probate, it appears to follow that he should pay the land agent upon proper showing of services rendered as outlined in the opinion to Judge Hill above referred to by you.

The foregoing answers question 2 and 3. The effect of the cases cited that all taxes bear their proportion of the expense of collection. Under the reasoning in the opinion to Judge Hawkins, the matter would be exclusively legislative in my judgment.

I am not quite clear as to the facts upon which your fourth question is based. Assuming it to be strictly a municipal levy, for municipal purposes (though appropriated to the schools) which the tax collector is required by statute or ordinance, authorized by Section 3095 of the Code of 1923 (Section 201 of the 1935 Revenue Act), to make such levy should not have been included in the decree of sale, and hence would not be a part of the "proceeds" upon redemption. **Biennial Report of Attorney General 1930-32, p. 1005.**

If on the other hand, it is a school district tax such district embracing only the City of Selma, the rule stated in answer to questions 2 and 3, would apply.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 24, 1936.

Hon. E. T. Carpenter,
Clerk, Circuit Court,
Washington County,
Chatom, Alabama.

When a defendant is convicted in the County Court of a criminal offense and appeals to the Circuit Court and is there convicted, the only fine which he has to pay is the one assessed in the Circuit Court, as the case when reaching the Circuit Court is tried de novo without regard to any former conviction.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 4, 1935 in which you request my opinion as follows:

"When a Defendant is sent to hard labor there is no fine collected. Suppose a Defendant is found guilty in County Court and he takes an appeal to Circuit Court and is found guilty in Circuit Court and is sentenced to hard labor.

"On the cost bill for the County Court side there is no fine charged, and the defendant works out the fine in Circuit Court and wants to pay the cost is he required to pay a fine in County Court? See there is no

fine added to cost against the defendant in county court when transcript is made up from Circuit Court and lower court cost brought forward the fine is not included."

The answer to your question is in the negative. When a criminal case is appealed from the County Court to the Circuit Court the case is tried de novo; that is, without regard to what happened in County Court Therefore, the fine assessed by the Circuit Court is the only fine for which the defendant can be required to pay. See Section 3843 of the Code of Alabama, 1923, which is as follows:

"3843. Trial of appeal de novo; statement of cause of complaint.—The trial in the circuit court shall be de novo, and without any indictment or presentment by the grand jury; but the solicitor shall make a brief statement of the cause of complaint signed by him, which may be in the following form:

"The State of Alabama, In the Circuit Court, ...term, ...County. 19..... On appeal from the county court.

"The State of Alabama, by its solicitor, complains of C. D., that, within twelve months before the commencement of this presecution, he did (here describe the offense as in the cases of indictment.)

G. H. Solicitor."

I do not find where this question has been before either of the courts of last resort nor has this office passed on it before, but I think the conclusion reached above is the only conclusion possible.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

February 24, 1936.

Hon. M. W. Forman,
Judge of Probate,
St. Clair County,
Ashville, Alabama.

Court Reporter:

1. County shall pay costs incurred by grand jury in having court reported transcribe proceedings of said grand jury, when reporter was directed to transcribe the proceedings by the solicitor or foreman of the grand jury.

2. County has no authority to pay court reported for taking testimony on preliminary hearing in county court.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of January 16, 1936, in which you state:

"Mr. H. H. Smith, Court Reporter in Circuit Court of St. Clair County has presented to St. Clair County, a bill for services rendered in making transcript of proceedings of Grand Juries held at Ashville and

Pell City. These claims of Mr. Smith are for copies made of the transcript, the original in each case having gone to the State.

"Please advise if county can legally pay above claim.

"Please also give me your opinion as to whether we can pay Court Stenographer in County Court, this being case of State of Alabama vs. Mrs. W. J. Corbett, which was a bank robbery case. I presume the Court Reporter was ordered by the Solicitor in this case."

It is my opinion that your first question should be answered in the affirmative.

In answering your question, I am assuming that the court reporter was directed to transcribe proceedings of the grand jury by the solicitor or the foreman of the grand jury, and that the copies of the transcript were used by the solicitor or the members of the grand jury in carrying out the duties, and purposes of said body.

In the case of State v. Knighton, 21 Ala. App. 330, 108 So. 85, the Court of Appeals of Alabama said: **When the grand jury is so impaneled and sworn, it becomes the supreme inquisitorial body of the county**, and no preliminary act of any court or judge can limit its powers."

As the grand jury is "the supreme inquisitorial body of the county" in my opinion the county should defray all reasonable expenses incurred by said body.

The reporter should be paid the copy rate of five cents per hundred words for preparing copies of the transcript as provided for in Section 6735 of the 1923 Code of Alabama.

It is my opinion that your second question should be answered in the negative.

I have been unable to find any authority for paying the court reporter for taking testimony in the county court. The only law providing for the payment of a court reporter is contained in Sections 6733-6742 of the 1923 Code of Alabama, and these sections apply to official court reporters for the various circuit courts of the State.

This office has previously ruled that there was no authority for paying a court reporter for taking testimony at a preliminary hearing in the Probate Court, or for taking testimony at a habeas corpus proceeding.—**Biennial Report of Attorney General 1928-1930, pp. 710 and 1025.**

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 26, 1936

Board of Revenue,
Barbour County,
Eufaula, Alabama.

Court of County Commissioners—County Governing Body may pay annual installments of cost of paving street in municipality, which abut county property, from gasoline tax fund.

Opinion by Assistant Attorney General Rowe.

Gentlemen:

I have your request for opinion dated January 23, 1936 over the signature of Messrs. McDowell & McDowell, as your counsel, as follows:

"Clayton is the county seat of Barbour County; and the Court House is situated on 'the square.' The County jail stands on 'Midway Street. Some years ago the city of Clayton duly and legally provided for paving the city of Clayton, and property fronting on the 'square' and Midway Street was assessed per front foot, the cost of the paving against these two pieces of property was assessed against Barbour County. The Board of Revenue in the course of years has met the annual assessments due the city of Clayton for paving asessments until default was made in 1934.

"Default has been made by the County in the payments due on said paving assessment and there is due on the Court House paving for 1934—$348.94, for 1935—$310.17, which are past due, and a balance of $276.87 due in 1936; and there is due on the County Jail paving for 1934—$147.28, for 1935—$130.92, which are past due, and a balance of $116.95 which is due in 1936. The bondholders of the said pavement bonds are pressing the municipal officers of Clayton for past due payments and threaten legal action if payment is not made of the amounts due.

"The Board of Revenue desire to pay this out of the County's Gasoline Tax. It should be paid, and as it is for roadways, it appears to us that it is legal. We desire to have your opinion on it, and trust you will approve the payment from the Gasoline Fund."

In my opinion, the County Board of Revenue may pay from the gasoline tax funds annual installments of the cost of paving streets within a municipality upon which county property abuts.

In Biennial Report of the Attorney General of 1932-34, pages 329 and 534, are two opinions of this office which, although not directly in point, supply the reasoning upon which the present conclusion is based.

In Smith vs. Franklin County, 221 Ala. 136, 127 So. 904, the Court, speaking to a question closely related to the one now under consideration, said:

"But that was not to hold that the Legislature might not authorize a county voluntarily to contribute to the improvement of a street in a city or town within the county, and certainly, the fact that the street improved or to be improved is contingent upon county property affords no argument against the constitutionality or legislative wisdom of such a contribution. Nor will it be denied that a county has an interest to be cared for in the highways, whether roads or streets, which lead to its courthouse and other public buildings. Nothing to the contrary of our present opinion was said in City of Huntsville v. Madison County, supra, nor in City of Decatur v. Southern Railway, 187 Ala. 364, 65 So. 536, where in some respects the opinion in City of Huntsville v. Madison County was amplified and explained as intending only that, in the then state of statutory law, there could be no 'personal judgment' against the county. Here, limiting our decision to the exigency of the case presented, we find no statutory or constitutional inhibition against a county's contribution, in the shape of interest-bearing warrants, to the improvement of the streets adjacent to its public buildings, even though located in a town or city."

I know of no provision of law which would bar the County Governing Body from paying the installments for paving from the gasoline tax funds.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 26, 1936.

Hon. R. H. McAnelly,
Judge of Probate,
Jackson County,
Scottsboro, Alabama.

Filing Tax—Under facts set out, instrument subject to the deed filing tax.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of January 4, 1936 in which you state:

"Please give me an opinion on the following as quickly as you can:

"Some time ago J. C. Spivey died, leaving in this County some real estate, and also an insurance policy. He also owed some debts against the real estate, and the widow filed a bill in the Circuit Court, in Equity to sell the real estate for the payment of debts. This was done and the Register has filed in this court the deed made to the widow, with a consideration of ten Thousand Four Hundred Seventy Five & No/100 dollars, which amount is to be used for the purpose of paying a mortgage to the Federal Land Bank of New Orleans. The insurance was used to buy this land.

"Please advise me if this instrument is subject to taxation."

It does not appear from your letter that the widow was the sole heir at law and that the proceedings through the Court of Equity were merely for the purpose of clearing the title in the person to whom it already belonged. In fact, I read your letter otherwise and that the widow is a purchaser at the Register's sale as if she were a stranger.

If I am correct in this assumption, it is my opinion that the instrument is subject to the deed tax based on the value of the property.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 26, 1936.

Hon. E. A. Veitch.
Deputy License Commissioner,
Jefferson County,
Bessemer, Alabama.

Taxation—License transient dealers.

Under facts stated, party held liable for transient dealers' license levied by Schedule 147 of the 1935 Revenue Act.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of January 10, 1936, in which you state:

"You will please furnish to me your written opinion on the following question namely:

"An established hardware merchant selling hardwares, automobile tires, accessories, and repair parts, both at wholesale and retail, sends his salesmen into other counties to solicit orders from various merchants, such salesmen selling to merchants only and that in wholesale quantities. Such salemen take bona fide orders for future delivery and on the next trip, possibly one week later, delivers to such merchant the merchandise which he has sold on the previous trip. In anticipation of the fact that such merchant or merchants might be short of certain articles not ordered by him or them for delivery on any certain trip made by such salesman, the salesman places various articles of hardware and automobile accessories, in addition to that for which he has bona fide orders, and if such merchant or merchants should need other articles, such salesman will deliver the same to him or them from the extra stock carried in his truck. Under this statement of facts would such wholesale merchant be liable for a license under Schedules 146 and 147, either or both, of the Revenue Act of 1935?

"I will appreciate a prompt reply to this inquiry as a local merchant is being questioned by the license inspectors of two other counties. However these inspectors have been good enough to wait until an opinion could be obtained from your office as to such liability with the understanding on the part of the merchant here that he would abide by your rulings."

In reply, beg to advise that it appears from the facts stated by you that, while the general custom of this wholesaler is to take orders and make later deliveries, in some cases he makes concurrent sales and deliveries. If I am correct in this, he is liable for the license required by Schedule 147 of the Revenue Act of 1935, if he sells only to retailers. If on the other hand, he makes sales to consumers, he is also liable for the license under Section 146. See opinion to Hon. J. F. Laseter, Probate Judge of Barbour County, dated October 30, 1935, found in book 7-A, page 248, Office Edition.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 26, 1936.

Hon. Eugene H. Hawkins,
Judge of Probate,
Jefferson County,
Birmingham, Alabama.

Filing tax—Deed to the Alabama Boys' Industrial School and filed by

it held not subject to deed filing tax, said school being an arm and agency of the State of Alabama.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of January 29, 1936, in which you state:

"Within the next day or two there is to be a deed filed in this office, executed to the Alabama Boys Industrial School. There is some doubt as to whether this deed should take a deed tax, as it is my understanding that this school is a State institution.

"Please advise whether or not this deed should take a deed tax."

In my judgment, the Alabama Boys' Industrial School is an arm and agency of the State of Alabama and as such would be subject to the immunity of the State and hence no deed tax would be due.

The school is organized under the authority of Sections 55 to 73 of the Code of Alabama, 1923, having been created by a special Act in 1919. It may acquire property by condemnation in the name of the State; its directors are nominated by the Governor; the Governor and certain of the named State officers are ex officio members of the Board of Directories; court may commit certain minor persons to its care; its conveyances are approved by the Governor; and it is supported by appropriations from the Legislature.

It is, therefore, in my opinon, clearly an agency of the State, and enjoys the immunities of the State.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 26, 1936

Hon. Howell Turner,
Secretary of State,
Montgomery, Alabama.

Costs and Fees--

Fee to Secretary of State provided by Acts 1935, p. 63, is chargeable for the perfection of service of process upon each non-resident defendant, although two or more such defendants are joined in one suit.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

Receipt is acknowledged of your request for opinion dated February 10, 1936 as follows:

"House Bill No. 84, Governor's No. 32 of the Acts of 1935 (Acts 1935, p. 63) provides a fee of $3.00 for process on non-resident operators of motor vehicles.

"Please advise whether I shall charge the fee of $3.00 in each case or $3.00 for each process where there are two or more defendants in one complaint."

In my opinion, a fee of $3.00 for each non-resident defendant to be so served with process should be collected in each case, although two or more non-residents are joined as parties defendant in one cause of action. The Act provides:

"Service of such process shall be made by leaving three copies of the summons and complaint, with a fee of Three Dollars, with the Secretary of State of the State of Alabama, and such service shall be sufficient service upon such non-resident defendant; provided, that notice of such service and a copy of the summons and complaint are forthwith sent by registered mail to the defendant by the Secretary of State of the State of Alabama, or his successor in office, and the defendant's return receipt and the certificate of the Secretary of State or his successor in office, of the compliance herewith, which shall be filed in the office of the Clerk of the Court or in the Court wherein said action may be pending."

It is analogous to the fee provided by law for issuance of process and for service thereof in cases of resident defendants. The fee provided by the Act of 1935, supra, is for the effective service of the process. It is to be collected for the perfection of service on each non-resident defendant.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 26, 1936

Hon. Saxon P. Poyner,
Judge of Probate,
Houston County,
Dothan, Alabama.

Coroner for Houston County does not have authority to appoint a deputy.

Section 1072 of the 1923 Code of Alabama, as amended by Act No. 444 S. B. 248, approved September 13, 1935, (General Acts 1935, p. 932), merely provides for certain duties to be performed by the Coroner when called on by the County Health Officer and does not restrain or limit the general duties of the coroner as provided by law.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of January 31, 1936, which is as follows:

"Please advise if there is an authority in law for a coroner to appoint a deputy.

"Should such deputy's bond be made payable to the State of Alabama or the coroner proper.

"Please advise, also, if Section 1072 of the Code as amended by the Legislature of August, 1935, and the provision contained is cumulative duties of the coroner or if this means that his duties are restricted to the provisions of this section.

"In other words does this section apply to his duties only as they relate to the demands made on him by the Health Officer when the occasion arises, or does it mean that in every case where a coroner is necessary he must be called only by authority of the Health Officer."

Answering your first question, in my opinion there is no authority under the general law for a coroner to appoint a deputy and I have been

unable to find any special statute which gives the coroner for Houston County the right to appoint a deputy.

Answering your second question, in my opinion Section 1072 of the 1923 Code of Alabama, as amended by Act No. 444, S. B. 248, approved September 13, 1935, (General Acts 1935, p. 932) merely provides for certain duties to be performed by the coroner, when he is called on by the County Health Officer, and does not restrict or limit the general duties of the coroner as provided by law.

The coroner is required by statute to perform certain duties that do not pertain to the health laws and in which the County Health Officer has no interest, such as are provided by Sections 160, 161 and 162 of the 1923 Code of Alabama, which are as follows:

"160. When to discharge duties of jailer.--

The coroner is keeper of the jail when the sheriff is imprisoned."

"161. When to discharge duties of sheriff.--

He must discharge the duties of the sheriff:

1. When the office of sheriff is vacant, and until his successor is qualified.

2. When the sheriff is imprisoned.

3. In cases to which the sheriff is a party.

4. In such cases as he is directed by the judge of probate."

"162. When sheriff interested, coroner acts.--

When the sheriff is interested in any cause or proceeding, such interest not appearing on the face thereof, the judge of probate may, on a proper showing by affidavit, direct the coroner to execute the summons, writ or other process, in such cause or proceeding.'

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 26, 1936

Hon. Roy Johnson,
Tax Assessor,
Jefferson County,
Birmingham, Alabama.

Taxation - Redemption - where party redeems from tax sale to the State under the installment plan authorized by Section 291 of the 1935 Revenue Act, he should assess and pay the taxes for all years subsequent to such redemption.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your request for opinion stating:

"Under Section 291 of the 1935 Revenue Code I quote from the last part of the section as follows:

" 'Shall deposit with the Probate Judge ¼ of the amount of accrued taxes without interest & penalties and annually thereafter, shall pay ¼ of said sum to the Probate Judge together with all taxes which may become due subsequent to such first payment until the whole amount required has been paid, and thereupon certificate of redemption shall be issued as in other cases.'

"Under Section 292, however, Judge Eugene Hawkins, Probate Judge of Jefferson County, and myself have agreed that the intent was for the Tax Assessor to accept assessments where a one-fourth payment had been made in the process of redemption and that the only way the subsequent years' taxes could be determined would be to assess property and let the tax collector collect the subsequent years. When installments were paid to the Probate Judge, a receipt from the tax collector, showing that subsequent taxes had been paid, would have to be presented to the Probate Judge before he would accept any new installments.

"Now the question is whether the tax assessor should take assessments where a one-fourth payment had been made in the process of redemption. Section 292 sets out that in cases of failure to pay either the next annual installment or the subsequent year's taxes that the same should be **sold.** Therefore, this leaves the impression that after one installment has been paid the State does not have title to the property, so it becomes assessable."

The sections of the Revenue Act primarily involved are Sections 291 and 292 of the 1935 Revenue Act.

The question of prime importance in your inquiry is whether a petition for redemption under the partial payment plan and the deposit of an installment as provided by 291 actually effects a redemption so as to pass the title from the State to the redemptioner, the State reserving a lien for the balance due, or whether by such payment the would be redemptioner merely acquire a right to redeem by making the remaining payments required.

In a lengthy opinion to Judge Hawkins dated November 22, 1935, Quarterly Report, Vol. 1, 207, I held that in a valid sale of land for taxes, the title passed to the State and hence the Legislature could fix such terms of redemption, including the waiver of interest and the right to make redemption on the installment basis - the opinion construing Section 291 and the related sections.

It is necessary, therefore, in answering your inquiry to bear in mind the philosophy and holding of that opinion.

The first postulate is that the sale of land for taxes conveyed the title to the State.

The next is that redemption is a manner of sale by the State of its property thus acquired, and

Third, the amounts fixed for redemption are not taxes, but amounts which the Legislature has declared should be paid upon redemption.

Fourth, that upon redemption the title of the State passes to the redemptioner.

With these premises, what is the nature of the redemption which is effectuated by the installment plan provided by Section 291. Section 291 provides in part:

"Section 291. Whenever any real estate has prior to January 1, 1935, been sold for taxes and bid in by the State at tax sale, the same may be redeemed in the same manner as heretofore provided for sales made after January 1, 1935, except that the following additional provisions shall apply: All persons having the right to redeem, shall have four years from the date of sale to redeem and such redemption shall be made as in other cases, except that the party desiring to redeem may pay the amount of accrued taxes in four equal installments without interest or penalties."

Attention is called to these expressions found in Section 291. "May be **redeemed** in the same manner," "all persons having the right to **redeem**", "shall have four years to **redeem**" "and such **redemption** shall be made as **in other cases** except that the party desiring to redeem may pay the amount of accrued taxes in four equal installments without interest or penalties."

Without more, the foregoing would very clearly indicate that so far as passing the title from the State to the redemptioner, the same legal effect is intended by the installment payment as if the redemption money had been paid in full.

However, the remainder of the statute provides:

"***any person having the right to redeem any property sold to the State for taxes, and who desires to redeem under the provisions hereof, shall, before January 1, 1937, make application to the State Land Commissioner and to the Probate Judge of the County where the real estate is situated, and shall deposit with the Probate Judge one-fourth of the amount of accrued taxes without interest and penalties and annually thereafter, shall pay one-fourth of said sum to the Probate Judge together with all taxes which may become due subsequent to such first payment until the whole amount required has been paid, and thereupon certificate of redemption shall be issued as in other cases."

This portion of the statute might cast some doubt on the conclusion reached above except for Section 292.

This Section provides:

"Section 292. The State of Alabama shall have a lien for all unpaid partial payments as well as for taxes for any subsequent year, and in case of the failure to pay any one of said installments together with the taxes for any subsequent year, either or both, the State Land Commissioner for and in the name of the State of Alabama, shall at his option declare all said installments due and payable at once. In case of default in payment of any installment or of any subsequent taxes, the State Land Commissioner in the name of the State shall have a right to file a bill in equity to foreclose the lien of the State the major portion thereof is situated. The Court shall determine and in such suit all parties at interest shall be made parties defendant. Such suit shall be filed in the County where the land or what amount, if any, of such taxes or installments are illegal, and in its final decree shall determine the total amount due on such installment payments, and any unpaid subsequent taxes, and shall render judgment therefor which shall include costs and shall order the property sold to satisfy the decree in the same manner as in the foreclosure of mortgages on real estate in the Court of Equity. If at such

sale no one bids a sufficient sum to pay the full amount of the decree, the officer conducting the sale shall announce that the real estate is sold to the State of Alabama for the amount of the decree, interest and costs, and the sale shall be reported to the Court and be confirmed and a deed made to the State of Alabama, and the State shall be entitled to a writ of possession. The purchaser at such sale, including the State shall be entitled to a deed, and the same processes and remedies to obtain possession of the premises as in other suits where land is sold under order of a court of equity, and the title to the land conveyed by such deed shall be indefeasible as to all parties defendant in the action."

It is to be noted that the State shall have a "lien" for unpaid installments. This would indicate that there is a conveyance to the redemptioner with a lien similar to a vendor's lien reserved, and not merely an option to purchase or redeem upon payment of the balance due.

This is further emphasized by the specific manner in which foreclosure is provided for and the ultimate sale to the State. There is even a provision for a deed to the State upon such foreclosure.

The conclusion that I reach from both the sections read together is that upon making the installment payment required, the lands pass back to the redemptioner and hence it is his duty to annually assess and pay the taxes thereon for the years subsequent to such redemption. He must, of course, also make the balance of the installment payments to avoid foreclosure as provided by Section 292.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 26, 1936.

Mrs. Macie Thrasher, Chairman,
Macon County Board of Registrars,
Tuskegee, Alabama.

Registration - Voting -

Wife of State employee may acquire residence of husband for purposes of registration and voting.

Opinion by Assistant Attorney General Small.

Dear Madam:

I have your letter of January 25, 1936 requesting my opinion as follows:

"I would like your ruling on the following:

We have here a young man working with the Highway Department that moves around so often that his wife does not get a chance to register. This is his home and he still votes here. His wife has never lived here but this young man thinks because this is his home that his wife would have the right to register and vote in Macon County, due to the fact that she is not in one place long enough to establish a residence."

In reply, I wish to advise that, in my opinion, if the applicant mentioned in your request offers sufficient proof to convince the Board of Registrars that she intended to make Macon County her home at such

time as would be twelve months preceding the next general election, that she has done no act which would militate against such intention in the meantime, she should be permitted to register in Macon County. I refer you to an opinion of the Attorney General rendered to Hon. Charles E. McCall, State Auditor, State Capitol, on the 29th day of January, 1936 in which you will find set out facts almost identical to the instant question.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 26, 1936.

Hon. M. F. Elrod, Chairman,
Board of Revenue of Marshall County,
Guntersville, Alabama.

Marshall County clerks' and sheriffs' fees payable from General Fund of the County under Act 349, H. B. 940 Approved September 6, 1935.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of January 24, 1936 and that of February 4, 1936 enclosing Act Act No. 349, H. B. 940 Approved September 6, 1935 and requesting my opinion as follows:

> "Will you be so kind as to give us a ruling on the Fine and Forfeiture claims against the General Fund, that has been submitted to the Board for the following cases, or rather the nature of same. Viz. Vagrancy, Grand Larceny, Abusive language, Public Drunkenness, Assault intent to murder, Carnal Knowledge, Alienation, Loitering in Automobile, Threatening to commit arson, Arson, Threatening to assault or kill, Peace Proceedings, Forgery, Assault intent to ravish , Fraud, False pretense, in other words please give us a list of all cases that are just claims against the General Funds of the County, and also a list of those that are not. Please do this as soon as you can in order that we may pay the Sheriff and Clerk what is due to be paid."

The Act you enclose provides "that on and after the passage of this Act, all costs and|or fees that accrue to the clerk and|or sheriff of Marshall County, Alabama which would otherwise be a legal claim against the Fine and Forfeiture Fund of said county in favor of such clerk and/or sheriff, shall be paid by the County to such clerk and/or sheriff out of the General Fund of Marshall County, Alabama instead of being paid out of the Fine and Forfeiture Fund of said County and which shall be preferred claim against the Fine and Forfeiture Fund of said Marshall County, Alabama.

In view of this section, these claims which were formerly "just claims" against the Fine and Forfeiture Fund of the County and now made claims against the General Fund of said County. These claims are governed entirely by Section 4039 of the Code of Alabama of 1923, as amended by an Act of the Legislature approved February 18, 1927 (General Acts of 1927, page 45) which is as follows:

> "4039.—Surplus of fund to pay officers.—Whenever there shall be a surplus of the fund arising from fines and forfeitures in the county treasury of any county, over and above the sum required to pay the registered claims of the State witnesses, the County Treasurer of such

county must pay the fees of the officers of the Court arising from **criminal cases in which the defendant is not convicted and the costs are not imposed on the prosecutor, or in which defendants have been convicted, and have been proved insolvent by the return of executions 'no property found', or in cases in which the State enters a nolle prosequi, or where the indictment has been withdrawn and filed, or the prosecution abated by the death of the defendant, unless the payment or distribution of such funds are otherwise provided for.** This section shall be held to apply to all fees of officers of the trial court arising on an appeal by the defendant to the Supreme Court or the Court of Appeals, in cases where the judgment of the trial court is reversed and a new trial allowed, or the defendant ordered discharged. It shall also apply in appealed cases, where the defendant has appealed from a conviction and sentenced to the State penitentiary, and the conviction is affirmed, to such part of the fees of the officers of the trial court, arising on the appeal, as are not paid from the convict fund under Section 3667 and 3668 of the Code, an execution for such unpaid part of such fees having first been issued against the defendant and returned 'no property found'. It shall further apply to the fees of the officers of the trial court, arising on an appeal, in cases where the defendant has appealed from a conviction, the punishment fixed being otherwise than imprisonment in the State Penitentiary, and the judgment of the trial court is affirmed, provided the defendant be first proved insolvent by the return of the execution 'no property found'."

Accordingly, these fees authorized to be paid under Section 4039 may lawfully be paid out of the General Fund of Marshall County.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 26, 1936

Dr. A. E. Harman,
President, Alabama College,
Montevallo, Alabama.

Charities--

Educational Institutions --

1. Trustees of Alabama College may accept gifts made for purpose of creating scholarship or for aiding college departments upon conditions imposed by the donors.

2. Investment of trust funds donated for creation of scholarship or other educational purposes is left to sound judgment and discretion of trustees of Alabama College.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"**One.** Can the Board of Trustees of Alabama College bind itself and its successors in office to a definte appropriation from year to year in perpetuity for the proposal indicated in the letter from Mr. Leventritt of date June twenty-fourth, 1935, at the same time giving to the College

the right to invest the capital or original benefaction to the credit of the College itself? Copy of Mr. Leventritt's letter is enclosed.

"It is assumed that the authority of Mr. Leventritt would be obtained before making such an investment provided it legally can be done. It will be observed that the setting aside of an appropriation at a definite rate of interest would not come from the general revenues of the College but from the Leventritt Scholarship and would be devoted to the proposition specifically indicated in the scholarship.

"**Two.** Can the Board of Trustees of Alabama College make a similar investment to that indicated above from the Unity D. Dancy endowment, the terms of Miss Dancy's will being considered (a copy of Miss Dancy's will and of the codicil of her will are enclosed)?

" **Three.** If the Alumnae of Alabama College are incorporated can the Board of Trustees of Alabama College lend the $12,000.00 from the Dancy Bequest to the Alumnae Incorporated, for the purpose of erecting a joint Alumnae and Faculty Club House on land adjoining the campus of the College?"

Answering your first inquiry, it is my opinion that the Board of Trustees of Alabama Collegee may accept the donation, invest it and use the income for the purpose of providing a scholarship.

In 11 Corpus Juris, p. 990, the rule is stated

"Educational institutions are usually expressly authorized to receive private donations. The directors, regents or trustees are at liberty to reject a proposed donation if in their opinion the terms are unlawful, or for any reason unacceptable to them. If, however, they accept it, they do so on the terms prescribed."

There is nothing unlawful in the proposal to make the donation to the College for a scholarship fund. The trustees may accept the gift upon the conditions imposed by the donor.

The pertinent provision of the Dancy will, a copy of which is attached to your request, is as follows:

" I, therefore, give, will and bequeath the sum of $50,000.00 to the 'Trustees of the Alabama College' at Montevallo, Alabama, and their successors in office, in Trust, however, said principal sum to be invested and held by said Trustees as an Endowment Fund, from which all revenues, incomes, dividends and yields, annually are to be used and devoted by said Trustees to the use, benefit and maintenance of the schools or Departments of English, Literature and Expression of the 'Alabama College' at Montevallo, Alabama."

By means of a codicil, the testator reduced the gift from $50,000.00 to $12,500.00.

Your second inquiry must be answered in the affirmative for the reasons assigned in answer to your first question.

Answering your third inquiry, it is my opinion that the donors have left the manner of investment of the trust funds to the sound judgment and discretion of the Board of Trustees of the College. If the articles of incorporation of the Alumnae Association authorize that organization to borrow money and pledge assets therefor, and if in the judgement of the Trustees

of the College, a loan to such organization is a sound investment, I know of no reason why the trustees may not invest the trust funds by lending the same to the said organization.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 26, 1936

Hon. Andrew J. Dearman,
Tax Assessor, Greene County,
Eutaw, Alabama.

Tax Assessor - Plat Book -

Plat Books may be made at such times as in the judgment of the county governing body are necessary.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of January 31, 1936 requesting my opinion as follows:

"Is the Board of Revenue of Greene County authorized to pay the Tax Assessor for making a Plat Book every four years?

"If not, how often is the Board authorized to do so?"

In reply I wish to advise that the answer to your question requires a construction of Sections 60 and 61 of the Revenune Act of 1935 (H. B. 324) found on page 41 of said Act which I set out here as follows:

"The Tax Assessor shall make, or cause to be made, a complete plat book or books of all real estate in the county, unless such book or books have already been provided, in a form to be prescribed by the State Tax Commission, in which the name of the owner shall be entered on each separate subdivision, together with the assessed value thereof.

"The court of county Commissioners or court of like jurisdiction shall pay out of the general fund of the county, for making out the plat books required by this and the preceding section, a reasonable compensation to the person performing said work which debt shall be preferred claim against the county."

In my judgement, there is no authority expressed here for the payment for making of the plat book "every four years". The law contemplates "the making" of this book at such times as the circumstances governing each case may require.

The county governing body is charged with the responsibility of paying for this service, and the duty of auditing this claim against the county for the purpose of determining whether or not it should be paid. See Section 234 of the Code of 1923.

It is, therefore, my opinion that if and when in the judgment of the county governing body the plat book in use by the Tax Assessor may no longer be used efficiently, they may allow compensation as provided by law for the making of this book.

A part of an opinion of the Attorney General rendered to Hon. Charles E. McCall on March 12, 1928 and reported in the Biennal Report of 1926-1928, page 468 is in conflict with the present opinion and is to that extent hereby expressly overruled.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 26, 1936.

Hon. J. F. Laseter,
Judge of Probate,
Barbour County,
Clayton, Alabama.

Probate Judge's duty on the expiration of his official relation, to turn over to his qualified successor all fiduciary funds.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of February 4, 1936 in which you state.

"Please give me opinion on the following question: On retiring from office as Probate Judge is it compulsory and according to law that the retiring Probate Judge turn over to his successor all fiduciary funds or is this left entirely with the discretion of the retiring Probate Judge,"

Answering your question, it is my opinion that it is the duty of the retiring Probate Judge to turn over to his qualified successor all fiduciary funds belonging to said office.

In the case of Thompson v. Holt, 52 Ala. p. 428, the Supreme Court of Alabama, said:

"It is the duty of every public officer, on the expiration of his official relation, to surrender to his successor the property of the office which the law commits to his custody. In such property he has no individual right or interest; the title to it resides in the public, and of it he is merely custodian during his continuance in office.

The duty is ministerial merely, no matter on what officer it devolves; and at common law, its performance was enforced by mandamus. The general assembly deeming the common law remedy too dilatory, and impressed with a conviction of the importance of avoiding the public injury which would ensue from protracted litigation between the outgoing and incoming officer over the property of the office, provided a summary **remedy for compelling the delivery of books, papers, property, and money, by public officers** to their successors. It is first declared that in all cases, in which it is not otherwise expressly provided, when any office is vacated except by the death of the incumbent, all books, papers, property and money, belonging or appertaining to such office, must, on demand, be delivered over to the qualified successor; a violation of the duty is a misdemeanor. ***" (Italics supplied).

I call your attention to Sections 5043 and 5052 of the 1923 Code of Alabama, which are as follows:

"5043. Failure to deliver property and papers of office to successor.-- Any person who fails or refuses on demand to deliver the books, papers property, and money belonging to an office to the qualified successor in office, as required by law, must on conviction, be fined not less than two hundred dollars.

"Section 5052. Clerk in office of judge of probate failing to deliver books, etc., to successor. -- Any clerk or person in the office of the judge of probate who obtains possession of the books, papers, money or property belonging or appertaining to such office pending a vacancy therein, and who fails or refuses on demand to deliver such books, papers money, or property to the lawfully qualified successor of the judge of probate, must, on conviction, be fined not less than two hundred dollars."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 26, 1936

Hon. Roy Sanderson,
Judge of Probate,
Marion County,
Hamilton, Alabama.

1. Veteran's Exemption Act (No. 494, approved September 13, 1935, Gen. Acts, 1935) applicable to veterans engaged in peddling.

2. Same--authorizes exemption of $25.00 each for State, County and Municipality.

3. Same--25% disability or more, required of applicant.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of January 17, 1936, in which you request information as follows:

" Please advise me just what exemptions on peddling license disabled soldiers are entitled to.

"I understand that they are exempt $25.00 State, and the same amount for County and Municipality. Please notify me if this is correct. I also understand that in order to get this exemption they must have 30% disability."

This office has heretofore held that a "peddler" is entitled to the exemptions granted to disabled veterans by Act No. 494, Senate Bill No. 348, approved September 13, 1935, (General Acts, 1935). See opinion to Hon. N. P. Tompkins, Judge of Probate, Colbert County, Tuscumbia, Alabama, December 9, 1935.

Your inquiry relative to the amount of exemptions to such veterans should be answered in the affirmative. I call your attention to Sections 2, 3 and 4 of the War Veterans Exemption Act, cited, supra; Section 2 provides a $25.00 exemption from State licenses, Section 3 authorizes the same amount of exemption from County license, and Section 4 grants a similar exemption from municipal license to the veterans properly qualified under the Act.

Your attention is directed to Section 8 of the Act above cited which provides for proof of the 25% or more disability, required by Section 1, as follows:

"Section 8. Proof of disability shall be made by exhibiting a Federal Government rated disability certificate to an extent of twenty five per cent or more, or an affidavit from an examining physician of the United States Veteran's Bureau showing that the applicant for license is physically disabled to the extent of at least twenty-five per cent or by the production of a pension certificate issued by the United States Government or by the State of Alabama or by a certificate of the county health officer of the county in which the veteran resides, or if there be no county health officer, a certificate by a reputable physician in the county in which the veteran resides, said physician's certificate to be attested before some officer authorized to administer oath."

Copies of the opinion to Judge Tompkins and the Veteran's Exemption Act are enclosed herewith for your convenience.

Yours very truly,
A. A. CARMICHAEL,
Attorney General

February 26, 1936

Hon. M. F. Elrod, Chairman,
Board of Revenue, Marshall County,
Guntersville, Alabama.

County Engineer's salary held payable from Gas Tax Fund.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your request of October 11th, which reads as follows:

"Will you please give me a ruling as to whether or not the County Board of Revenue will be allowed to pay the Engineer out of the Gas Tax Money?

"As you know we are working under the new act that was passed on Sept. 17th, 1935, authorizing that all road building and upkeep be under his supervision, and his duties will all be on the road."

In reply I wish to advise that in my opinion your question should be answered in the affirmative.

Section 4 of Senate Bill 184- Russell relates to the expenditure of the fund in question and provides in part as follows:

"Section Four: That such counties in this State, through their Courts of County Commissioners, Boards of Revenue, or other governing bodies, are authorized to use such gasoline tax, or the proceeds of warrants or securities issued and sold against the same, **for the construction, maintenance, repair, surfacing or resurfacing, grading and draining of roads, streets, bridges and causeways in such counties;".**

The County Engineer is an employee of the County whose compensation is not fixed by any definite provision of law. It is my information that

his duties are confined exclusively to services in connection with the maintenance, repair, upkeep, building, etc. of the roads. The services of the County Engineer are absolutely necessary in connection with the **maintenance, building or repair of county roads, bridges, causeways, etc.,** and as such constitute an element of expense, **in the maintenance, repair, construction etc. of such county roads, bridges, etc.**

In my opinion, the language of the above quoted Section is broad enough to permit the payment of the County Engineer's salary from the "Gas Tax Fund" of the county.

This opinion is based upon the assumption that the other provisions of the Act are met.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 26, 1936

Dr. J. A. Keller,
Superintendent of Education,
State of Alabama,
Montgomery, Alabama.

Schools -

1. In the event of the transfer of the administration of State Secondary Agricultural Schools to local school system under authority of Acts, 1935, page 1090, State Board of Education may operate demonstration farms provided for by Acts 1927, page 423, in cooperation with the Alabama Polytechnic Institute.

2. In the event of the transfer of State Secondary Agricultural Schools to local school system, and the abolition of the office or position of Secretary-Treasurer of said schools, appropriation made by Section 3, Acts, 1927, page 423, and proceeds of the products, for operation of demonstration farms may be paid to any agency named by the State Board of Education.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion under date of January 30, 1936 as follows:

"Will you please let me have your interpretation of Sections 9, 10, and 11 of Act No. 507, S. 424, Chesnut, approved September 13, 1935 (Acts 1935 p. 1090), in view of Act No. 366, H. 343, Ringer, Approved August 30, 1927, (Acts 1927 p. 423).

"The question arises whether, under the power granted by Act No. 507, supra, the State Board of Education may transfer to a local board of education, county or city as the case may be, the control of a state secondary agricultural school proper, to be administered by such county or city board of education as a unit in the high school system of such board, subject to all laws governing such systems at the time the transfer is made or that may hereafter be enacted, and retain the demonstration farm of any such state secondary agricultural school for operation by the State Board of Education under the co-

operative agreement with the Alabama Polytechnic Institute as provided in Sections 5 and 7 of Act No. 366, supra.

"In the event it is held that the State Board of Education may transfer the school proper, to a local board and retain control of the demonstration farm, please advise whether the State Board of Education would be permitted to substitute the Treasurer of Alabama Polytechnic Institute for the abolished Secretary-Treasurer to receive and disburse the appropriation for maintenance of the demonstration farm provided in Section 3 of Act 366, together with receipts from the farm."

In my opinion the 1935 Act providing for the transfer of the administration of State Secondary Agricultural schools to local school systems does not purport to change the system provided in the 1927 Act, supra, for the control and supervision by the Alabama Polytechnic Institute of demonstration farms operated in connection therewith.

Your second inquiry must be answered in the affirmative.

The appropriation made by Section 3 of the 1927 Act, and the provision for the application of the proceeds of the products of the farms, are for the maintenance of the demonstration farms, The abolition of the office or position of Secretary-Treasurer of the agricultural schools would not have the effect of causing the appropriation and allocation to lapse. Under Section 7 of said Act the Alabama Polytechnic Institute is required to supervise the work of the several farms, to make reports to the State Superintendent of Education at the end of the fiscal year concerning the work conducted, the results thereof and the **expenditures made.**

I know of no reason why the appropriation for operating the farms, and the proceeds of the products thereof, may not be paid to any agency which the State Board of Education may direct, if the office or position of Secretary-Treasurer of the agricultural schools is abolished.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

February 27, 1936.

Hon. J. W. Hamilton,
Tax Collector,
Jefferson County,
Birmingham, Alabama.

Taxation - Tax Sales - Certificates of purchase (1) Where land sold at tax sale is sold to individual, the tax collector should issue proper certificate of purchase. (2) Where the State is the purchaser, the Judge of Probate should issue such certificate.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of January 21, 1936, as follows:

"In attempting to apply House Bill 324 to the operation of my office I find that Sections 225, 231 and 232 conflict in regard to the issuance of certificates of purchase to the various purchasers, including the State, for lands sold for delinquent tax. Section 225 directs the

Probate Judge to order the Tax Collector to issue proper certificates of purchase to the various purchasers, including the state. Section 231 directs the Tax Collector to issue certificates of purchase to each purchaser other than the state, while Section 232 directs the Probate Judge to make out a certificate of purchase to the state of like import to the one provided for in Section 231.

"This certainly could not have been the intent of the legislature to require both the Tax Collector and Probate Judge to issue certificates of purchase to the State, and I would thank you for an opinion as to just which of these sections I should operate under.

"Inasmuch as I will have to immediately place my order for docket sheets, certificates, etc., costing several hundred dollars, I would appreciate an early opinion so that I may have same printed accordingly."

Section 225 of the 1935 Revenue Act provides:

"Section 225. Within ten days after such sale the Tax Collector shall make report of each sale to the Probate Court and praying confirmation thereof. Such report shall lie over for a period of five days for exceptions or objections thereto. If upon the expiration of five days no objections have been filed, or if in the opinion of the Court they are insufficient, and it appearing to the Court that the Tax Collector sold such real estate in accordance with the law, and the decree of Court ordering such sale, the Court shall make and enter an order confirming said sale, which shall be entered on the same book or docket as the original decree of sale, and ordering the Tax Collector to issue proper certificates of purchase to the various purchasers, **including the State."**

Section 231 of the Revenue Act of 1935 provides:

"Section 231. As soon after the confirmation of sale is made as may be practicable, the Tax Collector must make out and deliver to each purchaser other than the State, a certificate of purchase, which shall contain a description of the real estate sold and show that the sum was assessed by the Assessor, to whom assessed, the date of assessment for what year or years the taxes were due, the amount of taxes thereon, distinguishing the amount due the State and County, and for School purposes, and the fees and costs; that it was advertised and how long, and that it was offered for sale, and at what time, and who became the purchaser, and at what price, and the fact and date of the confirmation of such sale."

Section 232 of the Revenue Act of 1935 provides in part as follows:

"Section 232. For the real estate bid off for the State in each case the Judge of Probate shall make out a certificate of purchase to the State of like import to the one provided for in the preceding section, and deliver the same to the Tax Collector who shall, on final settlement, deliver all certificates received by him from the Judge of Probate to the State Comptroller, who shall examine carefully all certificates of purchase of real estate where the same were bid in for the State at tax sale.***"

While it would appear that there is a conflict between Sections 225 and 232, I think that they can be reasonably harmonized by reference to the primary subject matter of the two Sections. Section 225 is primarily con-

cerned with the report of sale by the Tax Collector and its confirmation by the Probate Court.

The controlling thought of Section 231, is the issuance of the certificate of purchase to the individual purchaser, which must be done by the Tax Collector and the controlling thought of Section 232 is the issuance of the certificate of purchase to the State when the State is the purchaser which must be done by the Judge of Probate.

While Section 225 says in its concluding clause, "And ordering the tax collector to issue proper certificates of purchase to the various purchasers, including the State," this must be read along with Sections 231 and 232, and must be construed to mean in the manner specifically provided by law.

It is, therefore, my opinion that if the words "including the State" have any field of operation, it is to require order of confirmation to recite that certificate of purchase be ordered issued in the manner required by law. This at least is contemplated.

If on the other hand, the two provisions are in conflict, I am of the opinion that Section 232, specifically treating of a specific subject controls, and the certificate should be made by the Judge of Probate where the State is the purchaser at the tax sale.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 27, 1936

Hon. W. E. Bishop, President,
Commission of Jefferson County,
Birmingham, Alabama.

Counties- County may purchase real estate sold on execution in its favor in order to realize upon its judgment if private purchaser cannot be procured and if amount bid in is not greater than the reasonable market value of the property at the time of sale and is not greater than the amount of the county's judgment, together with the costs of execution.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"Has Jefferson County the power to purchase at sheriff's sale, under execution issued out of the Circuit Court, lands levied on by the sheriff to satisfy an execution for costs. In this connection, please bear in mind that the county officers of Jefferson County are on a salary system and not a fee basis and that the costs in the Circuit Court for which execution is issued is the property of the county."

In my opinion, your inquiry should be answered in the affirmative.

Section 7221 of the Code of 1923 provides:

"7221. Costs given to successful party, or apportioned at discretion of court.- the successful party in all civil actions is entitled to full costs for which judgment must be rendered, unless in cases otherwise directed

by law, or by the judgment of the court. The court may apportion the costs at his discretion as justice and equity may require; and this provision is applicable in all cases in which the state is a party plaintiff in civil actions as in cases of individual suitors. In all cases where costs are adjudged against any party who has given security for costs, execution may be ordered to issue against such security; but this section shall not apply to justice of the peace courts; but in such courts, the successful party shall recover his costs."

This section applies to counties as well as private litigants. State v. Donaldson, 209 Ala. 400, 96, So. 617.

In Hill v. Moody, 207 Ala. 325, 93 So. 422, the Court said:

"Counties are civil or political organizations of the State, with limited and defined powers, and are agencies or auxiliaries in the administration of civil government."

In 15 Corpus Juris, page 419, Article 51, the rule is stated:

"As a county is a quasi corporation and a governmental agency of the state, with no independent sovereignty, it possesses only such powers as are expressly given, or necessarily implied, in statutes constitutionally enacted."

See also Standard Oil Company v. Limestone County, 124 So. 523. The county, having the right under the above quoted statute to invoke the process of the court for the realization of its judgment for costs, by necessary implication has the right to purchase lands levied upon to satisfy said process when the same are offered for sale.

This implied authority does not give the county carte blanche, commercially to engage in the real estate business by purchasing any and all real estate offered for sale under execution or otherwise. The county ought not to puchase at such sale if a private purchaser is available who will bid the amount of the county's claim and the costs of execution; and in no event, should the county bid more than the amount of its claim and such costs nor more than the reasonable market value of such property, when the same is offered for sale.

The decisions on the authority of the county under such circumstances are not uniform. In Shelley v. Lash, 14 Minn. 498 and Williams v. Lash, 7 Minn. 496, the right of the county to purchase real estate sold on execution in its favor is denied, except when the property so purchased is to be used for public purposes authorized by law.

In Parish of Concordia v. Bertron, 46 La. Ann. 356, 15 So. 60, it is held that the police jury of a parish might purchase property of its debtor sold under execution in its favor. In State v. Cunningham, 51 Mo. 479, Marshall County v. Hanna, 57 Ia. 372, Shanklin v. Madison County, 21 Ohio State 575, the question was presented as to whether or not a county could accept in settlement of obligations owing to it property which it had no statutory authority to hold and own. In each of the cases it was held that the acceptance of an assignment or transfer of such property in satisfaction of the county's claim or demand against the assignor or transferor contravened no law or policy of the State; and that the general authority to receive the indebtedness owing to it carries with it the implied authority to salvage the said indebtedness or so much thereof as was possible, by acceptance of said assignment or transfer of such property.

In passing, your attention is called to the rule stated in 15 Corpus Juris, page 532, Article 216, that:

> "Where the county is authorized for some purposes to acquire and to hold title to real estate, it cannot be made a question by any party, except the State, whether the real estate has been acquired for the authorized uses or not."

Following the general rule, the Oklahoma Court in Benedict v. Board fo Commissioners of Lincoln County, 17 Pac. (2nd), 454, said:

> "The mere fact that the county may have taken a deed conveying to it the fee-simple title for a purpose not authorized by law, does not render the deed absolutely void. Neither the parties who conveyed the land, nor their heirs can complain or maintain an action to set aside the deed, or recover the land; the state alone can, as a general rule, complain, and it alone can maintain an action to divest the county of title thereto."
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> * * *
>
> "The Supreme Court of the United States in the case of Reynolds v. First Nat. Bank, 112 U. S. 405, 5 S. Ct. 213, 217, 28 L. Ed. 733, held: 'Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable. The sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose.'
>
> "The Supreme Court of Missouri, speaking on the subject in Chambers v. City of St. Louis, 29 Mo. 543, said: 'There being a right in the city to purchase, if there is a capacity in the vendor to convey, so soon as a conveyance is made there is a complete sale; and if the corporation, in purchasing, violates or abuses the power to do so, that is no concern of the vendor or his heirs. It is a matter between the state and the city. The law is only directory in relation to a corporation taking lands. It imposes no penalty, nor does it in terms avoid the conveyance. Nowhere is a corporation in express terms prohibited from taking and holding lands. The city is duly incorporated with authority to hold, purchase, and convey such real and personal estate as the purposes of the corporation shall require; and if, in holding and purchasing real estate, she passes the exact line of her power, it belongs to the government of the state to exact a forfeiture of her charter; and it is not for the courts, in a collateral way to determine the question of misuser by declaring void conveyances made in good faith. In this view of the subject, we are amply sustained by the authorities."
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> * * *
>
> "Under these authorities, plaintiffs cannot maintain this action. If the county has exceeded its authority in acquiring the fee-simple title to the land, as a general rule, the state alone can complain."

Of course, it is the duty of the County Governing Body to dispose of the county's right and interest in all such property so acquired at the earliest practicable date at which the amount of the county's claim or demand, and the costs incident to said sale, can be realized therefrom.

Cf. Jackson v. Ball et al, 211 Ala. 273- 100 So. 327.

Yours very truly,
A. A. CARMICHAEL
Attorney General.

February 27, 1936

Hon. Ernest L. McClure,
Clerk, Circuit Court,
Lauderdale County,
Florence, Alabama.

Jury certificate must be issued for attendance as juror within 12 months from the discharge of the jury or else it is barred by the statute of limitations of one year.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of January 8, 1936, in which you request my opinion as follows:

"What length of time does a juror have in which to claim his attendance under Section 3760 Criminal Code of Alabama?"

It is my opinion that unless a juror presents his summons as such to the clerk of the court and has his certificate issued within 12 months from the date of his discharge by the court it would be barred by the statute of limitations of 12 months under Section 228, Code of Alabama, 1923, which is as follows:

"Claims barred if not presented.--All claims against counties must be presented for allowance within twelve months after the time they accrue, or become payable, or the same are barred, unless it be a claim due to a minor, or to a lunatic, who may present such claim within twelve months after the removal of such disability."
Jones et al vs. Jefferson County, 206 Ala. 13.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

February 27, 1936

Hon. O. F. Lightner,
Sheriff of Coffee County,
Enterprise, Alabama.

Search and Seizure - Search warrant for seizure of prohibited liquors which are kept or stored in filling station may be executed at any time of night that the place is open.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for an opinion as follows:

"Am writing for an opinion as to searching stores, filling stations, and other houses after night, for prohibited liquors and beverages.

"I want to search a house, the front part of which is a filling station and the back part is the living quarters of the operator and his family. The party just keeps the whiskey in this house at night."

In my opinion a properly issued search warrant for the searching of a filling station in which is kept or stored prohibited liquors or beverages

may be executed at any hour of the day or night that the premises are open. Section 4751 of the Code of 1923, provides in part:

"4751. The warrant may be executed at any time between eight o'clock in the morning and six o'clock in the afternoon, or at any other time that the place or premises are open; ***".

The fact that the operator lives in a portion of the house, in my opinion, is immaterial. If, however, the portion of the building used as living quarters by the occupant's family is to be searched at night, the affidavit should "state positively" that liquor is in the house. See Code of 1923, Section 5478 - **Lakey v. State,** 18 Ala. App. 442.

Of course, the warrant should not be issued except on probable cause. See Lundford v. Dietrich, 93 Ala. 565, 9 So. 308.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 27, 1936

Hon. Chas. W. Lee,
State Comptroller,
Capitol. **Attention Mr. Jarman.**

Search warrants -- In cases in which action is in rem, search warrants constitute a part of final record in the County Court. In cases in which action is in personam, search warrants do not constitute part of the final record in the County Court.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of November 1st requesting my opinion as follows:

"I would like to have your opinion as to whether or not a search Warrant is a part of the final record in a case in the County Court.

"The Convict Department contends that it is not, referring to the opinion of the Attorney General on page 252 of the Report of the Attorney General, from 1930 to 1932. Having studied this question with Assistant Attorney General Small, we have reached the conclusion that the reply to this inquiry hinges on whether a Search Warrant is a part of "The Proceedings" in the County Court.

"If it is you will observe that the "5th and 7th" paragraphs of the above referred to opinion seem to be in conflict."

In reply, I wish to advise that, in my opinion, the answer to your question must turn upon whether or not a search warrant is a part of the proceedings in the county court. In my judgment, in order for a search warrant to be a part of final record in the county court, said warrant must be a part of the proceedings in the court. In order for the search warrant or any of the proceedings in the case to be a part of a valid prosecution, the court in which said prosecution is brought must of necessity have jurisdiction of the matter before it.

There are two classes of cases in Alabama in which search warrants are issued. One class of cases authorizes the issuance of warrants for

search and seizure and constitutes an action in rem. In the case of Edmunds vs. State ex rel Dedge, 199 Alabama 555, the court held:

> "The procedure for search and seizure of intoxicating liquors under Temperance Act, January 23, 1915, (Acts 1915, page 8) is quasi criminal in nature, since **it is strictly penal in character and the only practical difference between it and a criminal prosecution is that it acts in rem instead of in personam,** and it cannot be classed among civil actions."

You will note that there is a distinct differentation of those cases in which a search warrant is issued for the purposes of search and seizure and therefore constitutes an action in rem from those cases in which a search warrant is issued the primary purpose of which is to secure evidence upon which to base a prosecution or an action in personam.

In those cases in which the action is in rem, it is my opinion that the issuance of the warrant for search and seizure confers jurisdiction on the court over the matter before it . This is particularly true in those cases which arise under search warrants for search and seizure authorized by Chapter 167, Article 11 of the Code of 1923, authorizing warrants for search and seizure in intoxicating liquor cases. Section 4761 of Article 11, supra, provides for the payment of costs if claimants appear and claim the seized liquor after order of forfeiture; and if no claimants appear, this section provides that the costs shall be paid as are costs in other cases where the State fails, viz: from the Fine and Forfeiture Fund. This particular type of case is criminal in its nature and cannot be treated as a civil procedure. See Edmunds vs. State, supra.

In my judgment, since the Legislature provided for condemnation of seized liquors and vessels, apportioning the costs when claimants appear and providing for the costs to be paid by the State in the event that no claimants appear, the Legislature intended that the entire proceedings be one in rem and that the warrant for search and seizure being the initial step in such procedure that it be a part of the cost in such cases.

Since the issuance of the warrant confers jurisdiction on the court, the costs of the warrant become a part of the costs in the case at the beginning and follow it through to its final disposition. The said warrant then, in my judgment, would become a part of the final record in such cases. In those in which the warrant is issued in aid of a criminal prosecution are actions in personam, the court acquires jurisdiction at the time the defendant is definitely charged with a crime. This may be done by either of two methods, viz: by arrest and the appearance of the defendant before the court or by the issuance of a warrant for the arrest of the defendant. I refer you to 16 Corpus Juris, page 298, paragraph 515. In either event, the actual charge of an offense must exist.

The prosecution begins at the time a warrant of arrest is issued by a court of competent jurisdiction. Search Warrants are not a part of the prosecution in these cases as they do not formally charge the defendant with the commission of a crime and do not therefore give the court jurisdiction to try any offense charged. It will, therefore, appear that Search Warrants are merely collateral to criminal proceedings in those cases which act in personam. I refer you to the case of Sugar Valley Land Company vs. Johnson, 17 Alabama Appellate 409, 85 So. 871. It must follow from these facts that criminal procedure in those cases which act in personam begins at the time the defendant is charged with an offense whether by arrest without a warrant or upon issuance of warrant for the defendant's arrest.

Section 5488 of the Code of 1923 provides concerning Search Warrants as follows:

"5488. When costs taxed against plaintiff.--

The complainant must pay the fees of the warrant before he is entitled to the same, and must also pay the officer his fees for the execution, before the same is executed; and if, on the hearing, it appears that there was no probable cause for believing the existence of the grounds of which the warrant was issued, the whole costs may be taxed against the complainant, and an execution issued therefor, returnable on any day the magistrate may direct."

You will note that under the provisions of this section, said search warrant is not a part of the costs in the case and must be paid for by the complainant.

Proceedings in the County Court begin at the time the court acquires jurisdiction. In those cases in which the action is in rem, the issuance of Search Warrant compels necessary jurisdiction and such warrant would therefore become a part of the final record in the case in the County Court. On the other hand, in those cases in which the action is in personam, the issuance of the Search Warrant confers no jurisdiction on the court as such jurisdiction is not acquired by the court until an arrest is made or a warrant of arrest is issued.

Premises considered, it is my opinion that search warrants in those cases which act in rem constitute a part of the final record in the case and in those cases in which the action is in personam, a search warrant is not a part of the final record in the case in the court. I refer you to the case of Toole vs. State, 170 Ala. 41, 46, 54 So. 195.

Yours very truly
A. A. CARMICHAEL,
Attorney General.

February 27, 1936

Hon. Gaston Scott, President,
State Highway Commission,
Capitol.

Fines collected for violations of Rules of Road (General Acts 1927, page 363) payable into funds mentioned in Section 106 (General Acts 1927, page 390).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of January 9, 1936, in which you request my opinion as follows:

"The question has arisen as to the disposition of fines collected for violations of the various provisions of Rules of the Road, viz: speeding, reckless driving, driving while intoxicated, overloaded trucks, etc. Should these fines be paid into the State Highway fund or into the Highway Patrol Fund?

"Please refer to Section 106 of the Rules of the Road as contained in the Acts of 1927, also refer to Section 8 and part (c) of Section 10,

which sections appear to cover the matter of collections, but fail to refer to fines as determined in the last named Act."

In my opinion fines collected for violations of the various provisions of the Rules of the Road should be credited to the funds mentioned in Section 106 (General Acts, 1927, page 390) of the Rules of the Road.

Section 8 of Act No. 331 House Bill No. 545, known as the Drivers License Act, authorizes all fines and forfeitures imposed upon persons "violating the provisions of this Act" to be "returned into the said Highway Patrol Fund". Your attention is invited to the fact that only fines collected for violations of the provisions **of the Drivers License Act** are to be paid into the Highway Patrol Fund.

Section 10 (c) of the Act cited supra, authorizes a fine of not less than $10.00 upon

"Any person who violates any provision **of this Act** for which no special punishment is prescribed or who violates any rule or regulation established or promulgated by the State Highway Commission, etc."

In my opinion, the provisions of Section 10 (c) supra, are not suffficiently broad to include fines imposed for violation of Rules of the Road (Acts, 1927, page 363), which rules are provisions enacted by the Legislature of Alabama and **not** established or promulgated by the State Highway Commission.

Accordingly the disposition of fines and forfeitures collected from persons violating the provisions of the said Rules of the Road should be as provided by Section 106 of the Rules of the Road (Gen. Acts 1927, page 370) as follows:

"Section 106. FINES AND FORFEITURES. All fines and forfeitures collected upon conviction or upon forfeiture of bail of any person charged with a violation of any of the provisions of this Article constituting a misdemeanor, shall be within thirty days after such fine, or forfeiture is collected forwarded to the State Treasurer. All amounts received from such fines or forfeitures shall be credited to the funds of the State Highway Department, for the maintenance of Roads and Bridges. Failure, refusal or neglect to comply with the provisions of this section shall constitute misconduct in office and shall be ground for removal therefrom. Provided that all fines and forfeitures collected by Recorders Courts or other municipal Courts for violation of ordinances, in cities and towns of over two thousand population according to the last or any subsequent census, whether for acts constituting violations of the provisions of this article or not, shall be paid into the Treasury of such municipality in which the same was collected."

See opinion to your department under date of January 15, 1936 (Office ed. Attorney-General Opinion Book 9-A).

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 27, 1936.

Hon. J. F. Posey,
Judge of Probate,
Autauga County,
Prattville, Alabama.

Registration - Liners - Person whose residence is located fifteen feet from county line held not to be a liner within the purview of Sections 367 and 368 of the Code of Alabama of 1923.

Opinion by Assistant Attorney General Small.

Dear Sir.

I have your letter of February 14, 1936 requesting my opinion as follows:

"Will you please give me an opinion on Section 368 of the Code of Alabama of 1923, and also 367?

"Here is my reason for this opinion: We have a man living at Billingsley, Alabama, who lives just a few feet, about 15 feet over the line of Chilton County. His property does not extend into Autauga County, but he runs a mercantile business across the line in Autauga County. His access to and from his residence is from Autauga County, in other words, when leaving his home and returning to it, his only way of approach is from Autauga County. We have your opinion and other opinions on Section 367, but the meaning of Section 368 is very vague in some respects, and if you can make it plain in an opinion, I will appreciate it very much.

"But the main question is, can a man whose residence is not divided by the line, as is mentioned in Section 367, but lives as I have stated above, 15 feet back from the county line in Chilton County, register and become a qualified voter in Autauga County?"

In reply, I wish to advise that in my opinion under the facts as stated, the man referred to in your request cannot register and vote in Autauga County.

You refer to Section 368 of the Code of Alabama of 1923 and say that the meaning of this section "is very vague in some respects". In my judgment, this section must be construed pari materia with Section 367 of the Code of 1923. These sections provide as follows:

"367. Residence in two or more counties; right to select.-- When the place of residence of any person is located partly in two or more counties or precincts, such persons may select the county or precinct of their residence, and to that end may file a statement in writing in the office of the Judge of Probate of the county selected, setting forth the locality of their residence and the lines passing through the same, together with the county or precinct selected for residence, which statement, when filed and recorded, shall establish the residence of the person filing it in the county or precinct of their selection."

"368. Liners between counties or precincts.--

Any person who may be declared to be a liner between two counties or precincts, and shall have fixed his or her citizenship according to law and that may be hereafter provided in such cases, shall be construed a

citizen and elector of the county or precinct in which he or she fixes his or her citizenship, for all the purposes of this chapter."

You will note that the first sentence of Section 367, supra, limits those who may make the choice set out in Section 368 to those whose "place of residence is located partly in two or more counties. . . . . The facts that one's business is located in another county and that his outlet to his property runs into or is located in another county in my judgment cannot affect the case. In my opinion, this man, under the facts stated, cannot be considered a "liner" within the purview of Section 368 and therefore, may not exercise citizenship rights in Autauga County.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 28, 1936

Hon. F. W. Reid, Clerk,
Circuit Court of Blount County,
Oneonta, Alabama.

1. Examiners' Reports--Examiners' reports should be recorded in the Court minutes.

2. Circuit Clerks-- Circuit Clerks held entitled to compensation from ex officio fees for recording reports of State Examiners.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of December 14, 1935 requesting my opinion as follows:

"The Report of examination made by the State Examiners of Commissioners Court, Tax Assessor's Office, County Treasurer's Office and Circuit Clerk's Office have been filed in the Circuit Clerk's Office. I understand that these reports are to be recorded in the Minute Book in this office.

"Please advise me who pays for the recording of these reports."

In reply, I wish to advise that Section 746 of the Code of 1923 provides for the recording of this report as follows:

"The examiners shall make sworn reports in triplicate, of their findings in state matters to the department within ten days after the completion of the work assigned, and triplicate reports on county work, two to the department, and the other to the judge of the circuit court or court having jurisdiction, who shall in his oral charge call the attention of the grand jury thereto and **have the same entered in full upon the minutes of the court.** Such reports shall be public records and shall be prima facie evidence of what they charge."

In my opinion, the above referred to reports must be entered in the minute book of the court; and in counties where ex-officio fees of the clerk are limited to two hundred dollars, the clerk shall be paid for the same as provided by law for copying such minutes in Section 7279 of the Code of 1923 as follows:

"Fees of clerks for keeping minutes of court. --

Clerks of the circuit courts in the counties where the ex officio fees of clerks are limited to two hundred dollars or less, shall be allowed out of the county treasury of the respective counties two dollars per day for the time the circuit court is in session in the county of which he is the clerk, for keeping the minutes of his said court, warrants for such service to be drawn by the probate judge of the respective counties; but said claim shall be first presented to and passed upon by the commissioners' court or board of revenue of the respective counties."

Circuit clerks in counties in which said ex officio fees are not limited to two hundred dollars are entitled to compensation for this work from their ex officio fees as provided by Section 7265 of the Code of 1923 as follows:

"Account for ex officio services itemized and sworn to; maximum of allowance. -- Persons entitled to an allowance by the court of county commissioners for what are commonly called ex officio services, shall, before the allowance is made, itemize such services, and make oath thereto, as in the case of other claims aginst the county. The compensation allowed shall be the fair and reasonable value of the services, in no case to exceed two hundred dollars per annum, unless otherwise provided by law."

See also case of Troope vs. Morgan, 109 Ala. 162, 19 So. 503, 504.

Yours very truly,
A. A. CARMICHAEL
Attorney General.

February 28, 1936

Hon. T. J. O'Gwynn, Recording Secretary,
Alabama State Association of Master Plumbers,
34 Pleasant Avenue,
Montgomery, Alabama.

Board of Plumbers -

1. Plumbers making application within reasonable length of time after appointment of "New Board" held to be within the intent of Acts of 1935, page 995.

2. Exemption - World War Veterans held exempt from license fees for plumbers.

3. Acts of 1931, page 764 held repealed by Acts of 1935, page 995.

4. Licenses issued under provisions of 1927 Act held not subject to renewal under Acts of 1935, Section 8.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of January 22nd, 1936 requesting my opinion as follows:

"In H-472--H409 Davis, an act to regulate Plumbing business. This Bill in Section 1, calls for a Board of Nine and was appointed on January 7, 1936 by the Honorable Governor Graves. At a meeting of this Board of nine, held January 20th, I was elected temporary Secretary and

was asked to secure a legal decision on six points of the law. We adjourned our meeting to February 10th, pending these decisions.

"In Section 7--In regard to Plumber licenses being granted without examination, provided he made application prior to January 1, 1936 and pay fees, etc.

"1. The Plumbers made this application as best they could, but not to the board, inasmuch as the Board was not appointed until January 7th, 1936. Has this Board the power to extend this time in order to comply with the intent of the law?

"2. Are World War Veterans exempt from the fees as required in Section 8?

"3. This Act is word for word the same as No. 268-H1138 Green, approved August 4, 1931, except that the board was increased to nine members and the population reduced to 80,000 to include Montgomery with Mobile and Birmingham.

"Does Section 14 void entirely the Green Bill, if so can this new Board take over the affairs of the old Board?

"4. Also in regards to Plumbers already licensed under the Green Bill can the New Board issue a renewal fee as mentioned in Section 8?"

Section 7 of the General Acts of 1935, page 995 provides in part as follows:

"Any person heretofore not required to be licensed and who on date of passage of this Act was engaged or worked at the business of master plumber and who is required to be licensed under this Act, shall upon furnishing this Board with satisfactory evidence of having been so engaged on said date, and of having the necessary qualifications, shall be granted a master plumber's or journeyman plumber's license without examination provided he makes application prior to January 1, 1936 and pays the prescribed fee."

You will observe that this provision sets January 1, 1936 as the time limit in which applications may be filed.

You state that these "plumbers made this application as best they could" but not to the present Board as the present board was not appointed until January 7th, 1936. You ask whether or not the present board is authorized to extend this time in order that these plumbers might comply with the intent of the law. In my judgment, under the above circumstances, as set out by you, the plumbers here considered should be permitted to file applications within a reasonable length of time after the appointment of the "new Board". I find no definite authority in the Act authorizing the board to extend the time for filing application for any definite period of time, but it is my opinion that applications filed as herein outlined will be within the intent of the law.

In reply to your second question, it is my opinion that World War Veterans who meet all the requirements of the Veterans Exemption Act (Acts of 1935, page 1057) which exempts veterans from the payment of any licenses amounting to $25.00 or less as prescribed by the said Veterans Exemption Act, would be exempt from the payment of the licenses herein contemplated.

In reply to your third question, I wish to advise that Section 14 of the Acts of 1935, page 995 provides as follows:

"All Laws or parts of laws in conflict with any provision of this Act are hereby repealed."

The Acts of 1931, page 764 referred to by you as House Bill 1138 - Greene, is repealed by the provisions of the 1935 Act herein considered. In my judgment, the 1935 Act, supra, is but a substitute for the 1931 Act considered and is, with a few minor exceptions, a re-enactment of the former legislation, now based upon a different population basis for the purpose of including Montgomery County within the same provisions formerly applied to only Jefferson and Mobile Counties.

I am therefore of the opinion that, since the 1935 Act, supra, is almost identical with the 1931 Act, supra, and is a substitute act covering the entire subject matter contained in the 1931 Act, the legislative intent is clear that the last enacted legislation should repeal the former. I refer you to 59 C. J. page 919 and authorities there cited.

You further ask if the "new board" may take over the affairs of the "old board". By the term "old board", I assume that you mean the board created by the 1931 Act, supra. The 1935 Act, supra, makes no reference whatever to the 1931 Act and is separate and complete within itself. It is therefore my opinion that the new board created by the 1935 Act can have no authority to "take over the affairs of the old Board".

In answer to your fourth question, I wish to advise you that in my judgment the "new Board" created by the 1935 Act has no authority to issue a renewal license at the renewal fees mentioned in Section 8 thereof. The 1935 Act does not contemplate a continuation of any licenses issued by the Board under the 1931 Act. See reasons cited in answer to your question numbered three.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 28, 1936.

Hon. D. R. Boyd,
Deputy Solicitor,
Randolph County,
Roanoke, Alabama.

State pays for removal of a prisoner from another State, who without requisition is returned by the Sheriff of the County in which the crime was committed to this State for trial, only when the defendant is charged with and convicted of a felony.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I acknowledge receipt of your letter of December 3, 1935, in which you state:

"At the request of the Sheriff of this county, I will thank you to render us an opinion as to payment of costs of apprehending a prisoner under the following circumstances:

"A felony (burglary) was committed in this county; about one month later at the request of the Sheriff of Talladega County, two men were arrested in Georgia, and the Talladega Sheriff went after them and they returned voluntarily. It developed that they were not the right parties for the Talladega case, but in the investigation they confessed the burglary here and so well related it that the injured party here and our Sheriff are thoroughly convinced they are guilty of the burglary here. The Talladega Sheriff collected from our Sheriff the costs incident to the arrest in Georgia and bringing the prisoners back to Talladega. Proper orders for removing the prisoners to this county were made and our sheriff made claim for removal costs from Talladega County here."

You request my opinion:

"Is the Sheriff of this County entitled to pay for the costs incident to the arrest in Georgia and bringing the prisoners back? If so, is it payable by the State or the County?"

It is my opinion that your question should be answered in the negative.

The payment for the return of prisoners without requisition is governed by Section 3742 of the Code of 1923, which is as follows:

"3742. Criminal returning to state without requisition; fees of sheriff. —In cases where any sheriff in this state receives notice from the authorities in another state that a party or parties is or are arrested for crime committed in this state, and the sheriff of the county in which said crime was committed goes to the state aforesaid and the party or parties aforesaid consents to return with said sheriff without requisition from the governor, said sheriff shall be entitled to the fees and expenses now provided by law where requisitions issue. But this section shall apply only to felonies and only where conviction of the party or parties is had."

You will notice that the section, supra, provides that before payment of the costs the sheriff of the county in which said crime was committed is to return the prisoner and the section shall apply only to felonies and only where the party is convicted.

As the Sheriff of Randolph County did not return the prisoners and as they have never been convicted of a felony, it is my opinion that the Sheriff of Randolph County is not entitled to be reimbursed for the costs of returning the prisoners from Georgia.—**Biennial Report of Attorney General, 1930-1932, p. 637; Biennial Report of Attorney General, 1932-1934, p. 175.**

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 28, 1936.

Hon. H. N. Watson,
Clerk of the Circuit Court,
Macon County,
Tuskegee, Alabama.

Fines—Penalties for violation of Act No. 192, Senate 174 (General Acts, 1935) payable to County.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of January 25, 1936, in which you request my opinion as follows:

"We have a case in the Inferior Court of Macon County, where the defendant was found guilty of failing to bring motor vehicle to a complete stop when approaching a school bus, stopped for the purpose of taking on or discharging school children.

"The defendant was fined $50.00, and I will thank you to advise me if this fine goes to the County or the Highway Department."

In my opinion the $50.00 fine is properly payable to the county in which the prosecution was commenced.

Section 2 of Act No. 192, Senate 174, approved July 17, 1935, (Gen. Acts, 1935) imposes penalties, as follows, on persons driving motor vehicles who fail to come to a complete stop before passing vehicles used to transport children, while such vehicles are engaged in taking on or discharging school children:

"Section 2. That any person violating this Act shall upon conviction be punished by a fine not to exceed $300, or by imprisonment in the County jail not to exceed 90 days, or both, at the discretion of the court."

Your attention is directed to the fact that no express provision is made in said Section or elsewhere in the Act cited above, for the disposition of the fines imposed for violation of the provision of the said Act. Accordingly, the disposition of the fines collected under the Act in question is governed by Section 4038, Code of Alabama, 1923, which provides as follows:

"4038. Fines to go to county, and judgment accordingly.—All fines and forfeitures shall be paid in money, and **shall go to the county** in which the indictment was found, or the prosecution commended, **unless otherwise expressly provided:** and judgment therefor must be entered in favor of the state, for the use of the particular county."

Cf. Opinion to Hon. Chas. E. McCall, State Auditor, February 13, 1935 (Opinions of Attorney General, Office Edition, Book 2-A page 153).

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 28, 1936.

Hon. Leonard V. Phelps, Director,
Bureau of Vital Statistics,
State Department of Health,
Montgomery, Alabama.

Coroner has authority to order the removal of a dead body from one registration district to another without the filing of a death certificate or the issuance of a removal permit.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of December 4, 1935, in which you state:

> "We would like to have your interpretation of the law concerning coroners and the removal of a dead human body from one registration district to another.
>
> You request my opinion:
>
> "Has a coroner power to direct the removal of a body from one primary registration district to another without the filing of a death certificate or the issuance of a removal permit, under the provisions of Chapter 31 of the Health Laws and Regulations of the Code of Alabama?"

It is my opinion that your question should be answered in the affirmative.

I call your attention to Section 4559 of the 1923 Code of Alabama, which is as follows:

> "4559. WITNESSES AND SURGEONS SUMMONED.—The coroner may issue subpoenas for witnesses returnable forthwith, or at such time and place as he may appoint; he must summon and examine as a witness any person who in his opinion or that of any of the jury, has any knowledge of the facts; he may also summons as a witness a surgeon or physician who must, in the presence of the jury inspect the body, and give a professional opinion as to the cause of death; when a coroner has been informed that a person is dead in the county, and that said person died without being attended or examined by a legally qualified physician, the coroner shall forthwith proceed to the place where the dead person is lying, and examine the dead body to ascertain the cause of death, he may summon any physician or surgeon, who shall make an external post-mortem examination of the dead body, and report his opinion of the cause of death to the coroner in writing; if the surgeon or physician is unable to determine the cause of death from an external post-mortem examination, and the coroner has reasonable cause to believe that deceased came to his or her death by unlawful means, the coroner may in such cases order any physician or surgeon to perform an autopsy or internal ex-amination on the dead body, and report the findings of said autopsy to the coroner in writing."

By the section, supra, the coroner is expressly given the authority to order any physician or surgeon to perform an autopsy on a dead body, and in my opinion this authority impliedly carries with it the right to immediately order the removal of the body to a suitable place for the examination, without any delay as might be necessary if the coroner was required to file a death certificate or secure a removal permit. In some rural communities, it might be necessary to send a body forty or fifty miles to have an autopsy performed, and in that event any delay could be of vital importance to the success of the autopsy.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 28, 1936.

Hon. Geo. L. McBride, Chairman,
Colbert County Board of Registrars,
Tuscumbia, Alabama.

(1) If party convicted of manufacturing whiskey and sentenced to the penitentiary, he is disqualified from voting.

(2) A party would not be disqualified from voting, who had been convicted of crime which would disqualify him, while his case is pending in the Supreme Court, as this qualification does not attach until the case is finally disposed of.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of January 15, 1936, in which you request my opinion as follows:

"We are desirous to know if a conviction for manufacturing liquor and sentence to the penitentiary would demand striking from the registration list. Also where parties have been convicted for offenses that would require their names being stricken from the list and case being appealed to the Supreme Court would we strike now or await the action from the Supreme Court".

In answering your first inquiry, I call your attention to Section 364, Code of 1923, which is as follows:

"Disqualifications of elector to vote.—The following persons shall be disqualified both from registering and voting: All idiots and insane persons; those who were by reason of conviction of crime disqualified from voting at the time of the ratification of the constitution on November 28, 1901; those who have been since November 28, 1901, or who shall be convicted of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretense, perjury, subordination of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, or any crime punishable by imprisonment in the penitentiary, or of any infamous crime or crimes involving moral turpitude; also any person who has been since November 29, 1901, or who shall be convicted as a vagrant or tramp, or of selling or offering to sell his vote, or the vote of another; or of buying or offering to buy the vote of another, or of making or offering to make false return in any election by the people, or in any primary election to procure the nomination or election of any person to any office, or of suborning any witness or registrar to secure the registration of any person as an elector."

You will note the above Section says, among other things:

"* * * or any crime punishable by imprisonment in the penitentiary." Therefore, a conviction of manufacturing whiskey, which carries with it imprisonment in the penitentiary, would disqualify a person from voting in any election held in the State unless his civil and political rights have been restored by the Governor. (Opinion of Attorney General, Office Edition, Book 4-A, 44).

Answering your second inquiry, would say that where a person has been convicted of an offence which would disqualify him from voting but has appealed his case to the Supreme Court, he would not be disqualified until his case was finally disposed of.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 28, 1936.

Hon. J. W. Bryant,
Tax Collector,
Cullman County,
Cullman, Alabama.

Revenue Act—

Mortgagee, purchaser or lienholder may pay tax on real estate without paying on personal property, under certain circumstances.

Revenue Act—

Person assessing property may pay part of assessment without paying all, under certain circumstances.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of January 18, 1936, requesting my opinion as follows:

"Please advise me as to whether or not a mortgagee, purchaser, or lienholder can pay tax on real estate which is included in an assessment with personal property without paying on the personal property listed therein. (Sec. 169, 1935 Code.)

"Also advise me if Section 169-A refers only to the person in whose name the property is assessed or to anyone wishing to pay any part of assessment."

The mortgagee, purchaser or lienholder may pay tax on real estate without paying on the personal property listed therein provided the value of the real estate can be ascertained from the assessment and provided further that the person to whom the personal property belongs has enough property subject to levy and sale out of which the taxes may be collected. (Section 169, 1935 Revenue Act, cited by you).

In my opinion, Section 169-A refers only to the person in whose name the property is assessed. (Section 169-A, 1935 Revenue Act, cited by you).

The Legislature made provision in Section 169 for a person, not the owner, who had an interest in a parcel of property to pay under certain safeguards the tax on the part of the property in which he is interested without having to pay the tax on all of the property of the owner. In Section 169-A, provision was made for the person making the assessment to pay only on part provided he also pays the tax on his personal property. In the former Section, a person not the owner is allowed to split the payment and in the latter Section the owner is allowed to split the payment.

Yours very truly,
A. A. CARMICHAEL,
Attorney General,

February 28, 1936.

Hon. T. A. Brasell, Chairman,
Mobile Barber Commission of Mobile County,
Mobile, Alabama.

Licenses—Barber Commission Mobile—House Bill 817 construed—

1. Act of cutting hair, if, under facts is shown not to constitute a necessary part of the operation know as beauty culture, held to be an act of barber business and necessitating a license as provided by House Bill 817 of the 1935 Legislature.

Opinion by Assistant Attorney General Small.

Dear Sir:

You request my opinion as follows:

"We want your opinion on Act passed by last Legislature September 2nd, 1935, H. B. 17, Barber License Law, which reads as follows:

"Section 2: Provided, however, the provisions of this Act does not apply to one (1) or more persons engaged in the practice of Medicine, Surgery or Beauty Culture.

"We have about thirty-three Beauty Parlors in the City and surrounding community that are cutting hair (out of line with their Beauty Culture work) and making charges for same. We understand that they can cut hair if it is in line with their duty, but can they otherwise?

"Please give us a ruling on this matter at your earliest convenience."

In reply, I wish to advise that the answer to your question is based in part upon such facts as may arise in each individual case. The answer here must necessarily be conditional.

The Act in question, part of which is quoted in your request, exempts from the provisions thereof, those engaged in "Beauty Culture." The Act does not define "Beauty Culture" and I find no judiciary definition of this term in the law.

Section 2 of the Act referred to in your request defines a barber in the following language:

"Section 2. A barber, barbershop, barbed college or other like business within the meaning of this Act is any person, firm, partnership, co-partnership, association or corporation, who, for a valuable consideration or hire, shaves or trims the beard; gives facial or scalp massages, or treats the same with oils or other preparations, singes, shampoos, cuts or dyes the hair of a human being, or applies hair tonic or other cosmetic preparations, clay or lotions to the scalp, neck or face, or engages in the teaching of any person or persons in the art of barbering as in this paragraph defined. Provided, however, the provisions of this Act shall not apply to (1) persons engaged in the practice of medicine, surgery or beauty culture, (2) persons actively engaged in the military service of the United States Government while acting in line of duty, (3) registered nurses in the course of their employment as such, (4) persons who render any of said services to members of their immediate families, or other persons who receive such services without charge therefor.

If the acts performed by the person who is termed a "Beauty Culturist" are the same acts defined here to constitute the barber business and are performed independently of and not as a necessary part of "Beauty Culture", as the facts in the case may show, it is my opinion that a license as provided by Section 1 of the Act above referred to is required in the following language:

> "Section 1. That after the passage of this Act it shall be unlawful for any person, co-partnership, association or corporation to act as a barber, operate a barber college, barber shop or other like business, to advertise or assume to act as such without a license issued by the Barbers' Commission of Mobile County. No co-partnership association or corporation shall be granted a license, unless every member or officer of said co-partnership, association or corporation who actively engages in the barber business, barber college or like business of such co-partnership, association or corporation, shall hold a license as a barber as hereinafter provided for."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 28, 1936.

Hon. A. L. Nettles,
Tax Collector, Monroe County,
Monroeville, Alabama.

Taxation—Refrigerator assessed on last day of September 1935, not liable for 1935 ad valorem tax.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of January 7, 1936 in which you request my opinion as follows:

> "A Monroe County tax payer purchased a new refrigerator in Monroe County on September 16, 1935. He did not own one up to that day. The Tax Assessor assessed him from information with the refrigerator for 1935 making the assessment on the last day of Sept. Please advise whether it is legal to collect tax for 1935 on this refrigerator."

In my opinion, the 1935 tax on refrigerator mentioned cannot be lawfully collected.

Section 29 of the Revenue Bill of 1935 provides for the assessment of preperty for ad valorem taxes as follows:

> "The return and listing of property, for taxation by the Tax Assessor must commence on the first day of October in every year, and shall be finished by him on the first day of January following; but the Assessor may be allowed through the third Monday in January in each year to make a supplemental return or list of property which he may have failed to have returned or listed prior to the first day of January, and such supplemental return must be entered as any other return and shall be embraced in the abstracts made for the Comptroller and Collector and State Tax Commission."

Section 11 of the said Revenue Act provides that

"All taxes, unless otherwise provided by law shall become due and payable on the first day of October in each year, and shall become delinquent if not paid before the first day of January succeeding, etc."

It is apparent from the above cited sections and from the entire system of tax administration that property is to be assessed for ad valorem taxes in the year preceding the date due and payable under Section 11. Accordingly, since the refrigerator mentioned in your inquiry was not assessed as provided by Section 29, you may not collect the tax for 1935 thereon.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 28, 1936.

Hon. John S. Golson,
Judge of Probate,
Butler County,
Greenville, Alabama.

Mortgage made by municipality filed by mortgagee is subject to the recording privilege tax.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter in which you state:

"There was filed in this office for record, a mortgage from the Town of Georgiana, Alabama to The Macabees. Section 63 of the General Acts of 1927, on page 550 provides that such a mortgage shall be admitted to record without the payment of any tax upon the debt secured thereby, or any other fee or charge except the costs of recording the instrument at the rate fixed by law. Please advise if there has been anything done since that time that requires that a tax be paid on such an instrument."

I call your attention to Section 368½ of the Revenue Act of 1935, which provides:

"Section 368½. The exceptions and exemptions from license or privilege taxes levied by this Act which are granted by this Act, are hereby declared to be exclusive, and any laws or parts of laws general, local or special, granting or attempting to grant any exceptions or exemptions, except as specifically granted herein are specifically repealed."

The effect is therefore to repeal Section 63 of Act No. 478 (Acts 1927, p. 550) to which you refer.

Moreover, the mortgage being presumably filed by the mortgagee, the general rules laid down in **Huntsville vs. Madison County,** 166 Ala. 389 and approved in **State vs. City of Montgomery,** 151 So. 856 that a political subdivision of the State is not subject to taxation, in the absence of a clear legislative intent to impose such tax, is not applicable as the mortgage is not filed by the municipality.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 28, 1936.

Hon. Jack Oppenheimer,
Member of Board of Revenue of Barbour County,
Eufaula, Alabama.

Department of Public Welfare—Traveling expenses of the County Board of Public Welfare held to be payable from the general fund of the county and not from any funds allotted to the Department of Public Welfare.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of January 6th, 1936, requesting my opinion as follows:

"Under an Act of the Legislature of Alabama, "To create a Department of Public Welfare," Senate Bill 365, Section 10 provides for an establishment of a "County Board"; Section 11 provides that members of the County Board shall serve without compensation, but shall be reimbursed out of the general fund of the county for the amount of their traveling expenses, and other expenses actually paid out while in attendance at the meeting of the County Board.

"Inasmuch as the Welfare Board is to have funds allotted to it, and will have a "general fund", we ask you to advise whether or not the general funds of the county—relates to the "general funds" of the Revenue Board, or the general funds of the Welfare Board."

"A claim has been presented to the Board of Revenue for traveling expenses by a member of the Welfare Board, which we are holding up until you can advise us."

In reply, I wish to advise that in my opinion the words "general fund of the county" as used in Section 11 of S. B. 365 - Walton having reference to the payment of traveling expenses of the members of the County Board of Public Welfare refer to the general fund of the county, as this term is commonly understood, and not to any funds allotted to the Department of Public Welfare.

Senate Bill 365 - Walton, supra makes no provision for a "general fund" for the Department of Public Welfare. The funds available for the Department of Public Welfare are made up of the following: (1) The funds appropriated by the Federal Government by authority of the Social Security Act; (2) those funds appropriated by the Legislature of the State of Alabama; (3) the amounts to be raised by the counties.

You will note that the expenditure of all the above mentioned funds is provided for by law in S. B. 365 - Walton S. B. 402 - Walton and S. B. 397 - Simpson, of the 1935 Legislature but none of the above named senate bills provide for the payment of traveling expenses for members of the County Board of Public Welfare from any of the above named Public Welfare Department funds.

Premises considered, it is my opinion that the traveling expenses of the County Board of Public Welfare must be paid from the general fund of the county and not from any funds of the Department of Public Welfare.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

February 28, 1936

Hon. E. T. Carpenter,
Clerk, Circuit Court,
Washington County,
Chatom, Alabama.

Where a prisoner, after conviction, is sent from one county to another for safekeeping and habeas corpus is sworn out in the latter county to test the legality of his incarceration, such proceedings are void- the court of this county not having jurisdiction to entertain and hear the writ.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of January 13, 1936, in which you request my opinion as follows:

"We have a case that a dispute has come up about; what county is responsible for the cost in a murder case which has been moved from Washington to Choctaw Co. by change of venue and the defendant has been in Mobile County jail for safekeeping after conviction. The defendant has caused to be held a habeas corpus hearing in Mobile County and the Probate Judge here is under the impression that Washington County is not liable for the cost in the habeas corpus hearing held in Mobile County."

I am not here discussing the question of cost or attempting to find which county should pay this cost but under the case of ex parte State, ex rel Attorney General, 150 Ala. 149, I am of the opinion, under the facts stated by you, that the courts in Mobile County are without jurisdiction to entertain this writ and not having jurisdiction, any order made in this case was void.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

February 28, 1936.

Hon. J. Lee Smith,
Judge of Probate,
Chilton County,
Clanton, Alabama.

The county is not liable for fuel and water used in the preparing of meals for prisoners confined in jail, but is liable for stoves and other utensils used in preparing and serving the meals for prisoners confined in the county jail.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of January 9, 1936, in which you request my opinion as follows:

"Will you please advise me whether or not under the situation and circumstances mentioned above Chilton County would be liable for the electric light bill for lighting the kitchen and for the water bill for water used in the kitchen and whether or not Chilton County would be liable

for the equipment of this kitchen, such as kitchen utensils, dishes, table tableware, knives, forks and other equipment used in the kitchen of a more or less permanent nature.

"As I stated above, one of the deputy sheriffs resides in this house and the house needs repairs at various times and will you further advise me whether or not the county can legally expend the funds for repairing the house such as painting, flooring, roofing and other more or less permanent repairs that the house may need. This house is the property of Chilton County and the title to the property is in Chilton County."

If the kitchen where the meals for prisoners are prepared which you refer to is not a part of the county jail, but is a separate building, located on county property, the county would not be charged with the lighting of the same. I call your attention to Section 4878, Code of Alabama, 1923, which is as follows:

"Section 4878. Expense of maintenance, etc., how paid.--
The expense incident to the construction, maintenance, sanitation, healthfulness and hygiene of each county jail, prison, and almshouse in this state shall be paid out of the funds of the county in which such institution is located and of the town or city, if the institution be a town or city institution."

You can see this section applies only to jails, prisons and almshouses and not to the house occupied by the jailer or sheriff, in fact, I find no authority for the county to furnish the sheriff and jailer living quarters outside of the jail and this office has so held in a recent opinion addressed to Hon. J. Lee Smith, Judge of Probate, Chilton County, January 2, 1936, Book 9-A.

As to the county furnishing fuel and water for preparing food for prisoners confined in the county jail, our Supreme Court in the recent case of Holcombe vs. Mobile County, 229 Ala. 77, held that the county could not be charged with fuel used in preparing food for such prisoners and under the reasoning set out by the Court, I think the right to furnish water for such purposes applies with equal force. Now as to supplies for the jail, such as cooking stoves, dishes and other cooking utensils, this office has held that this is a charge for which the county is liable under Section 4878, supra. Opinion of Attorney General, 1933, Book 16, page 174, Biennial Report of Attorney General 1926-28, page 171; Holcombe vs. Mobile County, 229 Ala. 77. While the last cited opinion is not altogether on all-fours with the question now under discussion but by the following language being employed in said opinion is shown the tendency of the court on matters of this character:

"Section 4878, Code, relates only to the expense of construction, maintenance, sanitation, healthfulness and hygiene of the buildings named. The term 'maintenance' there has no relation to the prisoners, but to the jail and its equipment. That term so used would no more require the county to furnish fuel to cook the food than to furnish the food itself. To extend it beyond maintenance of the building and its equipment would go beyond its language, and its setting, and be contrary to the terms of the Acts of 1923 and 1927, supra."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 2, 1936.

Hon. O. F. Lightner,
Sheriff Coffee County,
Enterprise, Alabama.

The county is liable for fuel used for heating the jail but not for cooking and preparing food for the prisoners.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of January 13, 1936, in which you request my opinion as follows:

"Wish you would advise me about the wood for heating the jail and for cooking food for the prisoners.

"Heretofore and now I am furnishing wood and paying for it out of my salary. Is it legal for me to do this or is it the duty of the County to furnish wood and fuel for the jail."

The county is liable and must pay for the wood or other fuel used in heating the jail but does not pay for wood or like fuel for cooking and preparing meals for prisoners in jail. I call your attention to the case of Holcombe vs. Mobile County, 229 Ala. 77. In the case above cited, it is held that the county is not liable for wood or fuel for cooking and preparing meals for prisoners for the reason the sheriff is paid so much per day for preparing food for each person confined in the jail and this allowance must take care of all things incident to such service. Opinion of the Attorney General Book 8-A, December 13, 1935, to Hon. Ab Crowe, Sheriff of St. Clair County, Ashville, Ala.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 2, 1936.

Hon. L. G. McPherson,
Clerk of the Circuit Court,
Fort Payne, Alabama.

1. A claim buyer, dealer in witness certificates or any other person is authorized or should be permitted to scrutinize any records of the circuit court except those that are open to the inspection of the public in general.

2. Section 8690, Code of Alabama 1923, applies to the grand jury docket before and after indictment is found.

3. It makes no difference whether or not there is a case on the grand jury docket where the defendant has been arrested or not, the general public should not be permitted to examine and scrutinize such docket and to permit the same is a criminal violation.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 15, 1936, in which you request my opinion as follows:

"1. Does a claim buyer, or dealer in witness certificates, have a right to scrutinize the records in the Circuit Clerk's office - before and after buying certain witness claims?

"2. Does Section 8690 of Code of Alabama prohibit such a dealer from examining the Grand Jury docket before and after an indictment is found?

"3. If there were one case on the Grand Jury docket where the defendant had been indicted and no arrest made, would that fact prohibit such a claim buyer from examining the Grand Jury docket?"

Answering your first inquiry, would say the party you referred to can only examine such books and records of your office as the public in general have access to and no others.

Answering your second inquiry, certainly the grand jury docket should only be open to the inspection of the clerk and the court authorities and it is a violation of the law for you to let anyone inspect the grand jury docket other than those holding an official office in connection with court. Your officials of the Circuit Court and even not these unless some special matter is involved.

You should keep it under lock and key. If this docket is to become a record that can be inspected by the public in general then the work of the grand jury becomes a farce and all any defendant would have to do is to get some friend to examine the docket and if a bill is found, then make his escape. Certainly Section 8690, Code of Alabama, 1923, applies not only to the dealer but to all persons except officers of the court and if you allow it to be inspected, you are subject to indictment under Section 8690, supra, which is as follows:

"8690. Disclosure of indictment by officer or grand juror.--Any judge, solicitor, clerk, or other officer of court, or grand juror, who discloses the fact that an indictment has been found, before the defendant has been arrested, or has given bail for his appearance to answer thereto, must, on conviction, be fined not less than two hundred dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county for not more than six months."

Answering your third inquiry it is my opinion that under the law such person has no right to inspect the grand jury docket. Whether he be script dealer or governor of the state, makes no difference. If there is not a single case on the docket except those in which the person indicted has already been arrested makes no difference.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 2, 1936.

Hon. R. L. Mosley,
Clerk of the Circuit Court,
Fayette, Alabama.

1. There is no authority of law for paying the clerk out of the Fine and Forfeiture Fund for issuing subpoenas for witnesses to appear before the Grand Jury.

2. Likewise there is no authority of law for paying the Sheriff out of the Fine and Forfeiture Fund for serving such witnesses.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of January 20, 1936, in which you request my opinion as follows:

"Is a Clerk entitled to 25 cents for each subpoena, which he issues in cases before the Grand Jury, where there is NO BILL FOUND, and signed by the Foreman, out of the FINE AND FORFEITURE FUND?

"If so, is the Sheriff entitled to 50 cents for serving each subpoena, before the Grand Jury, and signed by the Foreman, NO BILL FOUND?"

My answer to your request is in the negative, based on the case of Kilgore v. Swindle, Treasurer, 122 So. 333; Office Edition Attorney General Opinion Book 5-A, pages 11, 130 and 135.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 2, 1936.

Hon. Chas. W. Lee,
State Comptroller,
The Capitol.

1. For a case to be withdrawn and filed, it must be pending in the circuit court and must be an indictment and capias must be issued for the defendant for two terms and returned "not found". The county court is without authority under any circumstances to allow a prosecution to be withdrawn and filed.

2. The clerk of the circuit court is not entitled to pay for final record where a case has been withdrawn and filed under Section 4548, Code of Ala. 1923.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of January 13, 1936, in which you request my opinion as follows:

1. Is there any authority of law authorizing the Solicitor or Judge in the County Courts of the State to withdraw and file any charges against a defendant in the county court before an arrest has been made?

2. Is there any authority of law permitting the solicitor or Judge in the County Courts of the State to withdraw and file any charges against
t a defendant in the county court after an arrest and the defendant released under bond?

"3. Is there any authority of law permitting the Solicitor, with leave of the Judge of the Circuit Courts, of the State, to withdraw and file any indictment against a defendant after he has been brought into the custody of the court by being arrested, placed in jail, or released on bond?

"4. Is there any other authority of law or any other conditions under which the indictment or affidavit can be withdrawn and filed than is set out in Section 4548 above quoted?

"5. Is there any authority of law permitting Clerks of the Circuit or county courts to make and collect a fee of 15c for each 100 words for making a final record in cases 'withdrawn and filed'?"

My answer to your first inquiry is in the negative. The solicitor and the judge of the county court are without authority of the law to withdraw and file a prosecution which is pending in said court, for the reason Section 4548, Code of Alabama, 1923, applies only to cases in the circuit court (see Sec. 3740) and then only where the prosecution is based on an indictment and then only where a capias or warrant of arrest has been issued for the defendant for two terms and has been returned "not found", This Section is as follows:

"Section 4548. Withdrawal and filing of indictment or affidavit. -- In all criminal cases in the circuit court, in which a capias or warrant of arrest has issued for two terms, and has been returned 'not found', the solicitor may, by leave of the court, withdraw and file the indictment, with leave to reinstate the same when the ends of justice require such reinstatement."

Opinions of the Attorney General, Book 1-A, 153. The above statute is not mandatory and does not as a matter of course have to be followed if deemed not desirable. The cause may remain on the docket. **Drinkard v. State, 20 Ala. 9, Scott v. State, 94 Ala. 80.**

My answer to your second inquiry is in the negative for the same reason given for my answer to your first.

My answer to your third inquiry is in the negative for the reason given to your first.

My answer to your fourth inquiry is in the negative.

Answering your fifth inquiry, my answer is in the negative for the reason, there can be no final record in the case until the case is finally disposed of. You will note Section 6507, Code of Alabama, 1923, subsection 7 is as follows:

"To record, in well-bound books, within six months after the final determination of any cause, all the proceedings in relation to the same, except those previously recorded under Section 10129, (5736) and except as otherwise provided by this Code or ordered by the circuit judge."

So we hold that no final record can be made and charged for until the cause is disposed of and certainly the withdrawal and the filing of an indictment under Section 4548, Code of Alabama, 1923, is not a final disposition of the case. See Biennial Report of the Attorney General, 1928-30, page 558.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 3, 1936

Hon. A. H. Howard,
Tuskegee, Alabama.

Ad valorem taxes - Estate, divided after taxes are past due, held to be liable as a whole for past due taxes, and subject to sale for the same.

Opinion by Assistant Attorney General Small.

Dear Sir:

You request my opinion in substance as follows:

"I will appreciate an immediate ruling on the following question, which has been presented to my office.

"An estate composed of approximately five hundred acres of land was held in administratorship for several years, with 1934 still past due and unpaid and ready for advertising for taxes. In the early part of 1935 a homestead was set aside for the widow, but for the tax year 1935 the assessment was still made jointly in the name of the undivided estate. She will assess her homestead for the tax year 1936, but insists that the balance of the estate, to-wit, approximately four hundred and eighty acres should be charged with the taxes prior to the tax year of 1936."

In reply, I wish to advise that in my opinion taxes for the year 1934, if properly assessed, being due and unpaid, attach to the whole estate including the homestead set apart for the widow.

Under this statement of facts, the entire estate as above set out is liable for the 1934 taxes and may be advertised and sold in accordance with the law, if the assessment for the year 1934 was properly made.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 3, 1936.

Hon. W. O. Brownfield, Clerk,
Circuit Court of Lee County,
Opelika, Alabama.

Section 3669, Code of Alabama, 1923, applies to solicitors' fees.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 5, 1936, in which you request my opinion as follows:

"Will you kindly advise me on the following matter:

Where Solicitors' fees are collected in the County Court and paid into the County Treasury and placed in the Solicitor Fund account as required by Section 5512 of the Code, is the surplus of such fund, after paying the salary of the County Solicitor, or Deputy Solicitor for the County to be transferred to the Fine and Forfeiture Fund Account of the County? Does Section 3669, apply?"

It is my opinion that Section 3669, Code of Alabama, 1923, does apply to solicitors' fees.

This Section is as follows:

"The surplus money paid in to the state and county treasuries arising from the solicitors' fees after the solicitors and their assistants have respectively been paid the amount allowed them by law, shall be paid

into the fine and forfeiture fund of the respective counties in direct proportion to the amount received from the convictions respectively."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 3, 1936.

Hon. D. B. Borden,
Judge of Probate,
Hale County,
Greensboro, Alabama.

Quarantine--Grocery bill for family quarantined within corporate limits of city not a legal claim against the county.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of February 7, 1936, in which you state:

" A family in Greensboro has been quarantined for smallpox; these people have nothing to pay the grocery bill with and I want to know who can pay this bill or whose duty it is to pay the bill,, the city or the county. They are within the corporate limits of the City of Greensboro and the quarantine officer quarantined them upon the advice of the physician."

You request my opinion:

"I want to know if this would be a legal claim against the county."

In my opinion, as the family referred to in your letter is within the corporate limits of the City of Greensboro, the grocery bill is not a legal claim against the county.

I call your attention to Section 1218 of the 1923 Code of Alabama, which is as follows:

"1218. Expense of enforcing quarantine; how paid.--The expense of enforcing any quarantine for a county, or for a portion thereof, as provided for in the preceding sections, shall be defrayed by the court of county Commissioners, or of revenue of the county; that incurred in conducting a quarantine for an incorporated city or town shall be defrayed by the authorities of the city or town declaring quarantine."

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 3, 1936.

Hon. Coma Garrett, Jr.,
Judge of Probate,
Clarke County,
Grove Hill, Alabama.

Motor Vehicles -

Automobile used for demonstration purposes by a dealer, when sold, is a used automobile.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of January 29, 1936, in which you state:

> "I would like to know if a car that is used for demonstration purposes when sold by the dealer is considered a new or used car, in order to know what kind of tag to sell for this type of car. The dealers contend that a car used for demonstration, even though an old model, is considered a new car when sold and therefore no penalty is due on it. I would like your advice concerning this matter."

It is my opinion, that an automobile which has been used for demonstration purposes by a dealer and is then sold by said dealer, is a used automobile.

The license for said automobile cannot be purchased on a monthly declining basis and the only provision for a part year license is provided by Schedule 158.13 of the 1935 Revenue Act, which is as follows:

> "SCHEDULE 158.13. (a) One-half of the license herein provided for shall be paid plus One Dollar ($1.00) where the motor vehicle is acquired or brought into the State on or after April 1st of any year, or is not used or operated between the period from October first through March thirty-first following the payment of the registration fee or license tax on motor vehicle or trailers shall be evidenced by the delivery to the party paying the same of numbered license tags which shall be placed in a conspicious place, in an upright position, right side up, on the rear of the automobile, when a semi-trailer truck is operated, one tag on the rear of the semi-trailer. **"

If the dealer has been operating the car under the proper dealer's license and the purchaser procures a license within the time required by law, then in my opinion, there is no penalty due on said license.

This office has held that a person is not liable for a penalty for delinquency in taking out a license unless he actually operates said vehicle prior to the time he secures a license.-- **Quarterly Report of Attorney General, Vol. 1, p. 140.**

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 3, 1936.

Hon. N. P. Tompkins,
Judge of Probate,
Colbert County,
Tuscumbia, Alabama.

Taxation - Redemption: The provisions of Section 291 of the Revenue Act of 1935, authorizing the redemption of lands sold to the State for taxes, without interest or penalties, is limited to sales made prior to January 1, 1935 and within four years before application to redeem is made.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter in which you state:

"Please advise me whether or not an Applicant to redeem property which sold for taxes more than four years ago is exempt from the payment of interest for any part of the period since the sale on any subsequent tax which has accrued within the last four years on the property which is to be redeemed. I have an Applicant who has the idea that he should not be charged interest on the subsequent taxes which have accrued since the sale and within the period of four years and I will appreciate information from you on this point at your earliest convenience."

You are familiar with the opinion, dealing with Section 291, and companion provisions of the Revenue Act of 1935, rendered to Judge E. H. Hawkins, Probate Judge of Jefferson County, of November 22, 1935 (Quarterly Report Vol. 1, page 207).

In that, I held (P.215) that "if application is made within four years from the date of sale, redemption is authorized by Section 291, without the payment of interest."

This is in the nature of an exemption or certainly a manner of grace and cannot be extended beyond the specific language of the Legislature. I do not find where the Legislature has extended the operation of Section 291 in cases like yours, in which you state the sale was more than four years prior to the application to redeem.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 3, 1936.

Hon. Wm. W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Attention Mr. Simon Wampold, Chief Clerk.

Poll Tax-

(1) Poll tax held to be payable by persons between the ages of 21 and 45 years on October 1st of the year in which poll tax is due.

(2) Poll tax held to be payable for current year.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of January 16, 1936, requesting my opinion as follows:

"We have several inquiries in reference to Poll Tax and would thank you to give us an opinion clarifying the situation for us.

"First. If a man becomes 45 years of age in June 1935, shall he be due poll tax on October 1st, 1935?

"Second is Poll Tax paid in advance or is it paid for the current year?

"According to the Constitution, Poll Tax is due October 1st, and delinquent February 1st of the next year.

"We would thank you to give this opinion promptly so that we can advise properly those people who are waiting and only have until February 1st to pay their Poll Tax."

In reply, I wish to advise that in my opinion your first question should be answered in the negative. The Constitution of 1901, Section 194 provides in part as follows:

"***Such poll tax shall become due and payable on the first day of October in each year, and become delinquent on the first day of the next succeeding February, but no legal process, nor any fee or commission shall be allowed for the collection thereof. The tax collector shall make returns of poll tax collections separate from other collections."

The poll tax levied by this Section of the Constitution becomes due on the first day of October of each year and becomes delinquent on the first day of the following February. You will further observe that this Section of the Constitution levies the poll tax on persons classified according to age, viz.:

"***over the age of 21 years and under the age of 45 years who would not now be exempt by law***".

The Supreme Court discussing this question in the case of Graves v. Eubank, 205 Ala. 174 and overruling the case of Frost v. State, 153 Alabama, 654, said.

"Under the law as applicable, Frost was 45 years of age October 1, 1906, the day the tax fell due and if the Constitution exempted those over 45, he would have been liable; but upon a closer analysis of section 194 of the Constitution, we are of the opinion that it is the fixation of a tax on certain ones and not an exemption. In other words, it places a tax on those 'over age of 21 years and under 45 years of age.' Frost on October 1, 1906 was 45 years of age and not 'under the age of 45' as fixed by the Constitution."

Clearly, if this man becomes 45 years of age in June, 1935, he is not liable for poll tax on October 1st, 1935.

In reply to your second question, I wish to advise that in my opinion, poll tax is payable only according to the attained age of the elector, the first poll tax becoming due and payable on October 1st of the first year in which the elector is 21 years of age on or before October 1st, and continues to become due on each succeeding first day of October until the elector shall be 45 years of age, on or before the first day of October, unless, of course, he or she shall become exempt from such payment by the operation of law in the meantime. It is, therefore, my opinion that poll tax is payable for the current year and based upon the age of the elector.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 3, 1936.

Hon. Sam W. Hawkins,
Chairman, Board of Registrars,
Jefferson County,
Birmingham, Alabama.

A person convicted of a felony or other offense that involves moral turpitude is disqualified from voting in any election in Alabama until such disability is removed by the Governor.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 8, 1936, in which you request my opinion as follows:

"Mr. A. M. Miller was on September 5th, 1933 sentenced to serve a term of fifteen months in the Atlanta Penitentiary. The latter part of December, 1933, this sentence was modified by the Federal Court here to a jail sentence of six months.

"It is my understanding that the loss of Civil rights by reasons of conviction in a Federal Court is governed entirely by the laws of the State in which the party concerned resides. This being so, the Defendant being a resident of this State and the final sentence being one of six months, I would like to know whether or not this six months sentence in jail works a forfeiture of his citizenship rights. The charge was Conspiracy to Violate the Prohibition Law."

The right of sufffrage is a matter that is left up to each sovereign State. -- Biennial Report of Attorney General 1930-32, p. 742. But a conviction of a Federal offense that involves moral turpitude (which all felonies do) disqualifies a person from voting in any election in Alabama under Section 365, Code of Alabama, 1923, which is as follows:

" Any person who is disqualified from voting by reason of conviction of any of the offenses mentioned in Section 364 of this Code, except treason, whether the conviction was had in a State or Federal Court, and who has been pardoned, may be restored to his or her citizenship with the right to vote by the Governor, approved by the board of pardons and specially expressed in the pardon."

I am of the opinion that a person convicted of conspiracy under the Federal law is guilty of such an offense as would disqualify him from voting. I call your attention to Section 88, U. S. Code, Title 18, which is as follows:

"88. Conspiring to commit offense against United States. -- If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."
See also Biennial Report of Attorney General 1930-32, p. 712.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 3, 1936.

Hon. L. W. Price,
Judge of Probate,
Conecuh County,
Evergreen, Alabama.

Gasoline shipped from without the State of Alabama to counties Cities or towns in the State of Alabama, where such gasoline is stored and withdrawn by such counties, cities or towns, and used for governmental purposes, is subject to the excise tax on gasoline provided by Schedules 156 and 156.1 found on pages 253 and 254 of the Revenue Act of 1935.

Opinion by The Attorney General.

Dear Sir:

I beg to acknowledge receipt of your letter of February 25, 1935 as follows:

"Please advise as follows:

"May counties, Cities or Towns purchase gasoline outside the State of Alabama and have it shipped in by truck or railroad car, stored and used by such city or county, without the payment of the Excise tax on gasoline or any part of such tax?"

In answer to your question, I beg to refer you to an opinion of this office of April 1, 1935 in which it was held that gasoline purchased outside of Alabama by an Alabama City, and brought into the State solely for governmental use should not be taxed under the gasoline tax laws.

This opinion was based on an Act found on pages 859 and 860 of the General Acts of Alabama of 1931 and an Act of the Legislature of Alabama of 1932, extraordinary session, page 314.

The opinion was also based on a construction of the statutes just mentioned by the Supreme Court of Alabama in the case of the State of Alabama vs. City of Montgomery, 151 So. 856. In that case, the court held that a city which purchases gasoline outside of Alabama and stores it in a storage tank for use by it in its governmental functions is not subject to the gasoline tax imposed by the State upon storers of gasoline as defined by the General Acts of Alabama of 1931 and 1932.

It will be noted that the court in the case of the State of Alabama vs. City of Montgomery based its decision solely upon the proposition that a tax levied in general terms, with nothing to indicate that it was intended to apply to a city or county, will not be so held to apply to such cities, counties and towns. In other words, in the City of Montgomery case, the Court simply held that the wording of the act did not include, counties, cities or towns.

It will be noted that in the City of Montgomery case the court pointed out that:

"It is, of course, conceded by all that if it is a tax on the property or an essential element of its ownership, and not on an occupation or for a privilege, it is in violation of section 91 of the Constitution. The right of the state to tax a city as any other corporation except as prohibited or limited by the Constitution is not questioned.

***

" Since the privilege of storing is the basis of the tax, and for that purpose an excise may be levied, it is not controlled by section 91 of the Constitution, and it is immaterial to what use it is put after it is withdrawn from storage."

In other words, the court holds that this type of tax is not a tax on the property or an essential element of its ownership, but is an excise tax and that the basis of the tax is the privilege of storing.

I beg to refer you to Schedule 156.1, found at page 284 of the Revenue Act, Regular Session, 1935, H. B. No. 324 (Page 254 of Revenue Act). You will note that this schedule refers to the tax as an excise tax of 6c per gallon upon the selling distributing, storing or withdrawing from storage in this State for any use, gasoline as therein defined. I also beg to refer you to schedule 156, found on page 253 of the Revenue Act of Alabama of 1935, wherein the word "person" is defined as including persons, corporations, copartnerships, companies, counties, municipal corporations, school boards, agencies of the State and associations. It seems that these two sections were written with full knowledge of what the Supreme Court of Alabama had decided in the case of State of Alabama vs. City of Montgomery referred to hereinabove.

Under the facts stated in your letter, it is my judgment that a county, city or town that purchases gasoline out of the State and handles it in the manner set out in your letter must pay the excise tax provided by the Revenue Act of 1935.

It will be noted that Section 156.1 covers both the storing or withdrawing from storage in this State, for any use.

The opinion of this office of April 1, 1935 was correct under the law of that date. Our opinion of April 1, 1935 follows the case of State of Alabama vs. City of Montgomery. However, since the opinion was rendered, the Legislature, in the Revenue Act of 1935, has changed the law. Our opinion has not been changed but the law has been changed.

Yours very truly,
A. A. CARMICHAEL,
Attorney General

March 4, 1936.

Hon. L. W. Price,
Judge of Probate, Conecuh County,
Evergreen, Alabama.

War veterans--exemption from license tax.

A war veteran engaged in the business of operating what is commonly known as a rolling store is not entitled to any exemption whatever from license taxes.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of February 15, 1936, which follows:

"Please refer to an Act for exemption to disabled world war veterans from payment of business license on pages 1057 and 1058, Act of the

Legislature of 1935; and advise me whether or not a veteran entitled to the exemption may avail himself of same with regards the peddling of medicine or what is called Rawleigh's Products. These products are sold from an automobile instead of truck."

The veteran described in your letter is operating what is commonly known as a "rolling store". A person who travels from place to place in an automobile or truck which contains merchandise that he offers for sale at retail to the consumer is operating a rolling store. The last sentence of Section 1 of Act No. 494 approved September 13, 1935 (General Acts 1935 at page 1057) reads:

"Provided that no exemption, deduction or commutation shall be allowed any person from the license or tax on what is commonly called rolling stores."

In view of this provision, this office has previously held that a veteran who operates what is commonly known as a "rolling store," is not entitled to any exemption whatever from license taxes. See Quarterly Report Attorney General October-December, 1935, p. 133.

As to what license should be paid by the veteran described in your letter, I call your attention to an opinion in the Quarterly Report of Attorney General October-December 1935, at page 274, which covers this subject in full.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

March 4, 1936.

Hon. Gaston Scott, President,
State Highway Commission,
Capitol.

Attention Mr. F. C. Marquis.

The violation of neither Section 1642 of the Code, requiring certificates for mine foremen, nor Section 1683 of the Code, requiring the filing of maps corrected annually, would have the effect of terminating the right of a mine operator to mine coal under an appropriate lease.

Opinion by Assistant Attorney General Bibb.

Dear Sir:

I wish to acknowledge receipt of your letter of February 13 as follows:

"Jefferson County has received right of way for a certain road from Tennessee Coal, Iron & Railroad Company. Part of this right of way is subject to a lease for coal to J. E. Lacey who operates small truck mines. The said lease rights for the said Lacey (a copy of same is herewith attached, marked Exhibit "A") extends over the right of way of the contemplated road that is to be built.

"The coal on the right of way has been left sufficiently for the safe building of the contemplated road.

"The mines operated by the said J. E. Lacey, have never complied with any of the State laws which all mines are required to operate under.

"Section 1683 of the Code of 1923 amended by an Act of the Legislature of Alabama, No. 193, approved July 17, 1935, requires all owners and operators of coal mines to file a map in the office of the Chief Mine Inspector for the information of the Chief Mine Inspector and his Department.

"All mines are required also, to have a mine foreman with a certificate that has been issued by the State Mining Department. None of these requirements have been met by the said J. E. Lacey.

"Our contention is that the said J. E. Lacey will not have any right whatsoever to mine any of the coal under the right of way of the said contemplated road, due to the fact that he has not complied with the law. As stated above the County of Jefferson had no way of knowing that there was any coal under the said right of way because said maps were not filed in the Office of the State Mine Inspector, neither has the requirement of having a mine foreman with a certificate been employed by the said J. E. Lacey.

"Please advise in your opinion, would the said J .E. Lacey have any right to mine said coal on this right of way at any time after said road has been built."

Section 1642 of the Code requires persons acting as mine foremen to have obtained the appropriate certificate of competency therein indicated. Section 1683 of the Code requires the filing by the operator of the mine sufficient maps, corrected annually, to show the pertinent information regarding the status of the mine's operations. These provisions of the mining laws in general carry their own penalties for violations, but among them is not included the forfeiture by the mine operator of the right to continue to mine coal. It is assumed that Jefferson County had actual or constructive notice of the lease at the time it received a right of way deed from the Tennessee Coal, Iron & Railroad Company. If the mineral lease was not recorded in the Probate Office of Jefferson County, or if the county had no actual notice of the existence of an unrecorded lease, or knowledge of facts which would put a reasonably prudent man upon inquiry as to the existence of the same, then the county would take a prior right under its right of way deed. Cf. Alabama Power Co. v. Herzfield, 216 Ala. 671 Hn. 1.

It is my opinion, therefore, that Mr. Lacey would not, by reason of a simple failure to comply with the usual and appropriate mining regulations, forfeit his right to mine coal under the lease to which you refer. Nor, in my opinion would the fact that a public highway may have been meanwhile constructed over the surface of a part of the land under which he has the right to mine coal, have the effect in such a circumstance of preventing Mr. Lacey from exercising the rights granted under his lease. Of course, the law does not contemplate that the owner of a mineral lease in lands over which a right of way for public roads is necessary, may prevent the use of the right of way at all odds. The proper course would be to condemn his rights in the lands to the extent that they might interfere with the proposed public road when constructed.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 4, 1936.

Hon. G. W. Robertson,
Judge of Probate,
Baldwin County,
Bay Minette, Alabama.

Licenses—"An orange drink" which is a mixture of pure orange juice and plain water and contains no carbonated water or charged water or any other chemical of like kind or description, is such a product as to come within the contemplation of Schedules 26, 128 and 129 of the Revenue Act of 1935.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of February 13, 1936, in which you request my opinion as follows:

"Is 'an orange drink', which is a mixture of pure orange juice and plain water and contains no carbonated water or charged water or any other chemical of like kind or description, such a product as to come within the contemplation of Schedules 26, 128 and 129 of the Revenue Act of 1935?"

I am of the opinion that your inquiry should be answered in the affirmative as regards each of the above mentioned schedules

Schedule 26 provides in part as follows:

"SCHEDULE 26. Every person producing, bottling and/or distributing in bottles or other closed containers soda water, coca-cola, pepsi-cola, chero-cola, ginger-ale, grape and other fruit juices or imitation thereof, near beer, carbonated or malt or cereal beverages and all light preparations, known as soft drinks, shall not use any machine, machines and/or apparatus for the filling or bottling of the same until such person, shall have first applied for, paid for and obtained in advance from the Probate Judge a license, the fee for which, for each machine, shall be graded or proportioned as follows: * * * "

It will be noted from the above that this schedule specifically includes other fruit juices or imitation thereof.

"SCHEDULE 128. For each person engaged in the business of selling at retail cereal beverages, carbonated or other soft drinks, kept on hand and sold in bottles, shall pay an annual license of Two and One-half Dollars ($2.50).

(a) Each person engaged in the business of selling soft drinks in a store or stand conducting what is commonly known and called a soda fountain, including the right to sell at retail cereal beverages, carbonated or other soft drinks, kept on hand and sold in bottles, shall pay annually the following license: In unincorporated places, and towns and cities of not over five thousand (5,000) inhabitants, Ten Dollars ($10.00); in cities and towns of over five thousand (5000) and not over fifteen thousand (15,000) inhabitants, Fifteen Dollars ($15.00); in cities of over fifteen thousand and not over twenty-five thousand inhabitants, Twenty Dollars ($20.00); in cities of more than twenty-five thousand inhabitants, Twenty-five Dollars ($25.00)."

Schedule 129 provides as follows:

SCHEDULE 129. Each person engaged in the business of selling at wholesale non-alcoholic, carbonated or other soft drinks, shall pay an annual license of Fifty Dollars ($50.00). Provided that bottlers who have taken out bottle license for operating plants in this State shall not be liable under this Schedule, nor shall such bottlers be liable for any county or state license under Schedule 146 hereof, nor as transient vendors or dealers or peddlers."

It will be noted that each of these schedules uses the words "or other soft drinks." This phrase in my opinion is all inclusive and is sufficiently broad to include the product under consideration. An opinion of this office rendered to the Tax Commission on April 4, 1935, being in conflict with this principle is hereby overruled and withdrawn.

As to whether one dealing in the product in question would be liable for the license of a bottler, retailer or wholesaler depends on the exact nature of the business in each particular case.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 4, 1936.

Hon. W. M. Vaughn,
Judge of Probate,
Dallas County,
Selma, Alabama.

National Guard—Certificate of exemption from poll tax effective for the entire poll tax year.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"Please advise me as to how to handle the names of members of the National Guard, in good standing, in making up the voting list. Under the law, it appears that the certificate of the commanding officer is good only for the month in which it is issued. Therefore, it appears to me that it would be improper to place the names of any of them on the voting list, which is permanent through the year. You may have rendered an opinion on this subject heretofore, but if so, I have not seen it."

In my opinion, if a member of the National Guard presents a certificate of exemption from poll tax, etc., legally issued to him under the authority of Section 11 of the Military Code of 1931 (Acts 1931, p. 687), it is your duty to place his name on the voting list of the county, provided he is qualified otherwise as an elector. It will be noted that the certificate provided for covers exemption from road duty, street tax and jury duty as well as exemption from the payment of poll tax. As to the first three duties listed, it may be that if the certificate is revoked for cause, the exemption then and there may be terminated (a question which I am not called upon to decide).

But if, at the time the poll tax would be due but for the exemption, the member of the National Guard has complied with the law providing the ex-

emption and has presented a certificate evidencing that fact, he would be exempted from the payment of poll tax during the poll tax year, notwithstanding a subsequent revocation for cause of the certificate.

In Shepherd v. Sartain, 185 Ala. 439, 64 So. 57, the Court had under consideration subsection 6 of section 2061 of the Code of 1907 which provides:

"The following property and persons shall be exempt from taxation:

6. From poll tax all persons permanently disabled whose taxable property does not exceed $500.00."

The Court there said:

"If the voter who exhibits the disability would excuse himself from the payment of any particular poll tax, he must assume the burden of showing its initiation before the tax became due, and that his taxable property did not exceed $500.00 at the time the tax became due. The ownership of less than that amount at other times during the year will not support the exemption, nor will the ownership of more than that amount at other times defeat it."

I think that this statement of the rule is applicable here.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 4, 1936.

Hon. D. E. Laslie,
Judge of Probate, Macon County,
Tuskegee, Alabama.

Party held bound to pay poll tax for each year to be qualified to vote, regardless of fact that such tax has been paid for a total of twenty-five years.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of February 21, 1936, in which you request my opinion as follows:

"A man paid poll tax before he was 21 years old. That is, paid poll tax the fall of the year he was 20 and has paid poll tax every year since, but failed to pay the year he was 45; is he qualified to vote in the coming election in May? The total years paid is 25."

In my opinion the party mentioned in your request is not qualified to vote in the May elections.

According to the facts detailed by you, said party has paid poll tax for twenty-five year. If therefore, it is permissible for one to pay poll tax prior to the due date of October 1, prescribed by Section 194 of the Constitution, the party has fully complied with the law. However, this office has heretofore held in an opinion of May 8, 1930, to the Judge of Probate of Butler County, Greenville, Alabama, Biennial Report 1928-1930, p. 832, that poll tax cannot be paid in advance. It was there held that one who paid poll tax twice in

1928 and failed to pay in 1929 was not entitled to vote in the ensuing election.

The case of Shepherd v. Sartain, 185 Ala. 439, 458, Paragraph 22, 64 So. 57, modifies this opinion somewhat, the court saying that:

> "Where the records show the payment by a voter of his poll taxes for a series of years, with a single omission, and shows also the payment of two such taxes for a single year, thereby showing that he has paid the number of taxes to which he was subject, it will be presumed, nothing appearing to the contrary, that one of the duplicated payments was intended for the omitted year, and it will be treated as so paid."

It is to be noted, however, that under the facts set out in your letter it cannot be presumed that the payment made at the age of twenty was intended as a substitute for the omitted payment when the citizen became forty-five, and accordingly it will not be presumed that payment has been made for that year.

You do not mention in your inquiry, that the party voted in the election following the payment of poll tax in his twentieth year. Presuming that he did vote, your attention is again directed to the Shepherd v. Sartain case, supra, where at page 456 of 185 Ala. the Court holds that one who pays poll tax prior to reaching the age of twenty one and votes in an ensuing election, having of course reached his majority in the interim, is estopped from claiming exemption for paying of poll taxes.

It would appear, therefore, that the party having exercised the privilege for which he has paid, cannot now be heard to say that payment for his twentieth year may be used for his forty-fifth year, assuming of course that he did not become 45 till after Oct. 1st.

Premises considered, it is my opinion that the party mentioned in your letter is not qualified to vote in the May elections.

See also opinion to Hon. Wm. W. Hill, Judge of Probate, Montgomery County, Montgomery, Alabama, March 3, 1936, copy of which is enclosed for your convenience.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 4, 1936.

Hon. W. D. Little,
Probate Judge,
Sumter County,
Livingston, Alabama.

The affidavit which the probate judge may take for his protection when issuing licenses when the parties appearance raise a doubt in his mind as to their age is purely a personal matter of a probate judge and for his protection and is not a fee chargeable to the parties applying for licenses.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 14, 1936, in which you request my opinion as follows:

"In an opinion found on page 185 of your latest quarterly report you hold that $1.75 is the highest legal charge for issuing a marriage license but you do not discuss a situation that I have in my county. In many instances the parties who are to be married do not appear to purchase their license but send some one else, or sometime only one of the contracting parties appears. Hence the Judge cannot always depend on the appearance of the parties to ascertain their ages. Therefore we are forced to take an oath as to the ages of the parties. Under Code Section 7285 the Judge of Probate is allowed 25 cents for administrating any affidavit not otherwise provided for. Does not this affidavit relative to the ages of parties desiring to procure a marriage license come in this class and thus bring the total charge, at least in the cases where it is necessary to secure affidavit, up to $2.00?

"The enclosure is a sample of the affidavit we require in many instances."

The affidavit you enclose a copy of, is not required of a person applying for a marriage license but is a precautionary method for your own protection. This affidavit may be taken by you as probate judge or may be sworn to before any other officer with the authority to administer an oath. General Acts, 1898-99, page 39, simply provides that in case a couple applies to you for a marriage license and from their appearance you think they are under age, you as judge of probate may require the making of the above affidavit. This relieves you from the penalties provided by the proceeding Act. It is no part of the license fee and cannot be so considered but is merely a precautionary matter, wholly for your protection as judge of probate.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 4, 1936.

Hon. J. S. Sandlin,
Sheriff, Morgan County,
Decatur, Alabama.

The judge of the county court is without authority to release a prisoner from jail when there is a grand jury indictment returnable to the circuit.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of January 9, 1936, in which you request my opinion as follows:

"Please render us an opinion on the following:

"Has the Judge of County Court authority to release a prisoner from jail, when there is a Grand Jury indictment, 'returnable' to Circuit Court."

My answer to your inquiry is in the negative, that is if I understand what you mean, when you say release from jail. I take it, you mean that judge of the county court made an order releasing the defendant without bail. If the defendant is being held under an indictment which emanated from the circuit court, the judge of the county court has no jurisdiction of

the defendant nor of the offense, the circuit court having already assumed such jurisdiction, unless the right of the sheriff to hold such defendant has been put in question by a writ of Habeas Corpus, which must be addressed to the judge of the circuit or to the probate judge of the county. See Section 4310, Code of Alabama, 1923, which is as follows:

"Section 4310. To whom petition must be addressed.—When the person is confined in a county jail, or any other place, on a charge of felony, or under a commitment or an indictment for felony, the petition must be addressed to the nearest circuit judge, or to the probate judge of the county where the person is confined; and when the person is confined in the penitentiary, or under a sentence, judgment, decree, or order of the Supreme Court, or the circuit court, other than an indictment for felony, the petition must be addressed to the nearest circuit judge; in all other cases, it may be addressed to any one of them, or to the probate judge of the county; and when the person is confined in any other place than the county jail or the penitentiary, and on any other than a criminal charge, it may be addressed to any justice of the peace of the county, or to the probate judge thereof. All local or special laws in conflict herewith are expressly repealed."

From the above it is clear that the judge of the county court could not as such judge entertain such writ. It must be addressed to the judge of the circuit or to the judge of probate of the county as such and not to the judge of the county court. It is true in many instances the judge of probate and the judge of the county court is one and the same person, but the jurisdiction of the probate court and county court are entirely distinct and separate and as judge of the county court, he has no jurisdiction in matters arising on Habeas Corpus.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 4, 1936.

Mr. D. E. Hale, Treasurer,
Pickens County,
Carrollton, Alabama.

Where claim of county treasurer against insolvent bank for tax monies deposited therein is paid to him if the claim as filed and paid includes a certain amount as proceeds of special school taxes, the treasurer or other lawful custodian of school funds is entitled to be paid such a proportion of the amount paid to the county treasurer as the total amount of the school funds included in the claims filed against the bank bears to the total amount of such claim.

Opinion by Assistant Attorney General Bibb.

Dear Sir:

I wish to acknowledge receipt of your letter of December 14, 1935, which is as follows:

"In the case of the State of Alabama for the use of Pickens County etc., vs. C. M. Glass, et als., adjudicated in the Circuit Court in Equity of Pickens County, a decree was rendered ordering the Superintendent of Banks, liquidating the Bank of Carrollton, to pay over to the County

Treasurer of Pickens County the monies decreed to be due complainants, being tax monies deposited in said Bank of Carrollton by C. M. Glass, as Tax Collector for said County, some of which belonged to the county, and a portion thereof being school funds, and there has been paid, under said decree, in a lump sum to me, as said County Treasurer a dividend representing 75 per cent of said monies.

"As I understand the law, I, as Treasurer of Pickens County, am not the custodian of such school funds, which are to be administered by the County Treasurer of School Funds.

"I have been advised that if the County Treasurer of School funds shall file a claim for this school fund with the Court of County Commissioners, and obtain an order from said Court to pay out such funds, that I, as such County Treasurer, could legally pay a warrant drawn pursuant thereto.

"Please advise me if such warrant so drawn would be legal for me to pay said warrant, and whether or not, I, as such County Treasurer, and the sureties on my bond, would be protected in the event I paid such order or warrant."

That proportion of the total claim filed against the bank which represents proceeds of collection of special school taxes by the Tax Collector and deposited in the bank with the monies pending transmittal to the Treasurer or other lawful custodian of school funds does not belong to the general funds of the county. Therefore, when all or a part of the entire claim against the insolvent bank is paid to the County Treasurer, the Treasurer or other lawful custodian of school funds is entitled to such a proportion of the amount paid to the county treasurer as the amount of such school funds included in the claim bears to the total amount of the claim and remittance should be regularly made to him therefor. The county treasurer could, therefore, legally pay a warrant in favor of the treasurer of school funds drawn in pursuance of an order of the Court of County Commissioners directing such payment.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 4, 1936.

Hon. M. C. Thomas,
Sheriff of Jackson County,
Scottsboro, Alabama.

County Jails in Alabama are required to have a watchman to look after the jail and the inmates under Section 4879, Code of Alabama, 1923.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 6, 1936, in which you request my opinion as follows:

"Our jail here is old and dilapidated, and we have had many escapes here in the past few years on account of its age and weakness. It requires my constant attention to prevent escapes, and having no jailer it is working a hardship on me, as I have other duties that require my

time in the administration of the office. So I am writing you if the commissioners of the county have the authority to allow me a jailer and he to be paid for his services of the general county funds. It is my understanding that other sheriffs throughout the State are furnished jailers by the county, and if it is legal I certainly want to also have one. The necessity of one here is admitted by our people, so I am asking you to please give me an opinion as to the law governing such cases."

Answering your request, I call your attention to Section 4879, Code of Alabama, 1923, which is as follows:

"Prisoners shall not be confined in any jail or prison in this state when such jail or prison is not provided with a deputy, watchman or attendant whose duty it shall be to watch the jail or prison at night for the prevention of escapes and fire, and to aid in case of sickness among the prisoners, and who shall have access to the jail or prison and to the prisoners. If the state prison inspector is satisfied, after inspection, that the construction and management of a jail is such as to render a night watchman unnecessary, he may by written order to the sheriff suspend the appointment of such watchman, this order to be subject to revocation at the discretion of the prison inspector. The sheriff, in case of a county jail, or the proper governing authority, in case of a municipal jail, shall appoint, direct and control said deputy, watchman or guard and the court of county commissioners or board of revenue, or the proper municipal governing authority, as the case may be, shall fix a reasonable salary and the same shall be paid out of the funds of the county or of the municipality, if it be a town or city jail, in which the jail is located."

Under the provisions of the above statute, you are entitled to a watchman. In fact, this statute makes it imperative.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 4, 1936.

Hon. J. Blocker Thornton,
Judge of the Circuit Court of Mobile County,
Mobile, Alabama.

Circuit Judges—Acts 1932, p. 301, providing traveling expense allowance for Circuit Judges not applicable to Judge of Circuit composed of one county.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion dated February 17, 1935, as follows:

"I beg to acknowledge receipt and thank you for a copy of your opinion dated February 13, 1936, addressed to the Hon. R. B. Carr, Secretary, Association of Circuit Judges, Anniston, Alabama, defining the force, effect and status of the excerpt copies from, 'Acts of 1932, extra session, at page 301,' as follows:

" 'Provided, however, that Circuit Judges and Circuit Solicitors in judicial circuits of more than one county shall each receive the sum of $100.00 per annum for each county of their judicial circuit over

and above one and the said additional amounts to be a reimbursement of their reasonable expenses while in attendance on court outside of their home county.'

"I am one of the three Judges for the 13th Judicial Circuit of Alabama, and in 1934, under the appointment and orders of Chief Justice Anderson, I held court in Washington County two special terms, which is in the First Judicial District, and outside of the 13th Judicial District. I made out my bill for travelling and hotel expenses, but did not and have not heretofore made any claim for the $100.00 under the provisions of Acts of 1932. The caption of the Act, supra, is as follows:

" 'AN ACT, Relating to the Salary or Compensation of Officers or Employees of the State, or of any Departments thereof, whose compensation is paid out of the State Treasury.'

"I write to ask further amplification of your opinion so as to state whether or not the provision ruled on by you, limits the extra $100.00 per annum only to those judges having more than one county in their circuits and is explanatory as to amounts they may receive? For illustration if a judge has five counties in his circuit and is ordered to hold court one week outside of his circuit can he claim $400.00 for such service?

"2. Is it the purpose of the law to provide compensation for such judge who performs extra service outside of his Circuit, as in my case herein noted?"

Answering your first inquiry, it is my opinion that the 1932 Act, supra, provides for an expense allowance to Circuit Judges whose circuits are composed of more than one county and that the allowance is to reimburse the Judges for travel expenses incurred while performing their duties out of the counties of their respective residences, but **within** their respective circuits. It has no application to a Judge of a Circuit composed of only one county.

Your second inquiry must be answered in the negative. The traveling expenses of Circuit Judges who perform their duties, under orders of the Chief Justice, out of their circuits are provided for otherwise by law.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 4, 1936.

Hon. Frank O. Deese,
Judge of Probate,
Dale County,
Ozark, Alabama.

Dale County - Candidate for Office of Superintendent of Education must have qualifications prescribed by local Acts of 1927, page 52.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your request for opinion as follows:

"Please refer to Local Act appearing on pages 52, 53 and 54 of Local Acts of 1927 and advise me just what qualifications must be possessed

by a candidate for county superintendent of education in this county before the probate judge may have his name placed on the primary ballot."

Under Section 4, Local Acts 1927, page 52, any person is eligible as a candidate for the office of Superintendent of Education of Dale County who has the following qualifications:

1. That he is a qualified elector of the State at the time of his nomination or election.

2. That he holds an Alabama certificate in administration and supervision based as a minimum upon graduation from a standard normal school or equivalent education with at least one year of additional study of college grade.

3. Proof of three years successful teaching experience.

There is a provision in the Local Act, supra, that the candidate must also have "such other additional qualifications as may be provided by the general school laws of the State." However, the general law provides for no additional qualifications as a prerequisite for eligibility.

Your attention is specifically directed to the provisions of Section 4 of the Local Act, supra, that no person shall be eligible as a candidate for said office "who does not procure from the Superintendent of Education of the State of Alabama a certificate that he possesses the qualifications prescribed by this section," and that such "certificate shall be filed with the Probate Judge of Dale County before his name shall be printed upon the official ballot."

This certificate, when filed, is probably conclusive upon the Probate Judge as to the eligibility of the person therein named, as a candidate for Superintendent of Education.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 5, 1936.

Hon. M. F. Elrod, Chairman,
Board of Revenue of Marshall County,
Guntersville, Alabama.

Old Age Pensions -

1. Inmates of county almshouses, possessing other qualifications required by law, may file application for old age pensions.

2. No old age pensions may be paid to any person who is an inmate of a public institution.

3. Inmates of almshouses who possess other qualifications of law for old age pensions can only be removed from almshouses subject to approval of Public Welfare Department.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of January 6th, 1936 requesting my opinion as follows:

"Please give us an official ruling as to whether or not we can put any of the inmates of the County Alms-House on the old age pension or not."

In reply, I wish to advise that in my opinion inmates of the county almshouses may apply for old age pensions. I refer you to Section 19, S. B. 397 - Simpson, approved September 14, 1935 which provides in part as follows:

"Nothing in this Act contained shall be construed as prohibiting any person now an inmate of a public institution from applying for a pension hereunder."

I wish further to advise you that no inmate of the county almshouse although he possesses all other qualifications required by law to receive old age assistance, can receive the same while he remains an inmate of said institution. I know of no authority, however, to transfer inmates of the county almshouses to the old age pension list except as provided for by S. B. 397 -Simpson, approved September 14, 1935, supra; and S. B. 365 - Walton, approved August 27, 1935, Section 8, Sub-section 1 providing as follows:

"In order to carry out effectively these aims it shall be the duty and responsibility of the State Department to:

(1) "Administer or supervise all forms of public assistance including general home relief, outdoor and indoor care for persons in need of assistance, and old age pensions, also including those duties that have to do primarily with the determination of need and authorization of relief now performed by the Alabama Relief Administration."

You will note that this provision necessitates cooperation with the Department of Public Welfare which board now has authority to administer all forms of public assistance in the State of Alabama.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 5, 1936.

Hon. Chas. W. Lee,
State Comptroller,
CAPITOL.

Fine and Forfeiture Fund-Fine and Forfeiture Fund of Cullman County defined by Local Acts 1915, page 487, as amended by Local Acts 1919, page 55.

Costs and Fees--No authority to pay commissions to officers under Local Acts 1915, page 487, as amended by Local Acts 1919, page 55.

Sheriff's Fees--Clerk's Fees--Sheriff and Clerk required to itemize costs due them under Local Acts 1915, page 487 as amended by Local Acts 1919, page 55.

Official Bonds--Liability. (1) Probate Judge, (2) County Treasurer, (3) County officer held liable on official bond for the payment or the receipt of the payment of an illegal claim against county.

Opinion by Assistant Attorney General Small.

Dear Sir:

You request my opinion as follows:

"1. Under Local Act approved September 25, 1915, (Local Acts 1915, page 487) what funds constitute the Fine and Forfeiture Fund of Cullman County?

"2. Is there any authority given in said Local Act and Amendatory Act thereof to pay any officer commissions on any funds so collected and turned into the Fine and Forfeiture Fund of Cullman County?

"3. Would the failure of the Clerk or Sheriff to itemize the costs due them, as provided in Section 10 of the original Act, and as amended by said Local Act of 1919, page 55, invalidate any of such claims the payment of which were received by them out of the General Fund of the County?

"4. Would the payment of such costs to the Clerk or Sheriff where the items making up the total amount due are not set out in detail as required by Section 10 of the original Act, and as amended by said Local Act of 1919, page 55, but all of the costs being stated in a lump sum, make it a legal claim against the General Fund of the County?

"5. If such claims, not showing the items of costs, are paid out of the General Fund of the County, should all of these claims be set up, in a proper exhibit, as illegal payments?

"6. Would the Probate Judge, who issued the warrant be responsible under his official bond?

"7. Would the County Treasurer or County Depository, who paid the warrant, be responsible under his official bond?

"8. Would the County Officer who received the amount be responsible under his official bond?

"9. What would be the responsibility of the other members of the Court of County Commissioners who voted to approve the payment of such claims?"

In reply, I wish to advise that in my judgment, the language of Section 2 of Local Acts 1915, page 487, answers your first question as follows:

"All fines and forfeitures collected, the hire of county convicts, all monies received from the State, or collected by the clerks of the circuit court and county courts or other officer, on account of witness fees and solicitor's fees collected in all cases tried in the circuit court, shall be paid into and constitute the fine and forfeiture fund of said county."

I do not find that the amending Act of 1919 referred to in your request purports to amend Section 2, supra.

Your second question must be answered in the negative. I have carefully read both Acts above referred to and find no such authority granted.

In reply to your third question, I wish to advise that in my judgment, the sheriff and clerk should file itemized statement of their fees in the cases contemplated by this Act with the commissioners court. I refer you to Section 2, Local Acts of 1919, page 56 which amends the Act of 1915, page 487, supra, as follows:

"That Section 10 of an Act entitled 'An Act to regulate the fine and forfeiture fund of Cullman County and provide for the registration and payment of claims against said fund,' approved September 25, 1915, be and the same is hereby amended so as to read as follows:

"Section 10. That after the adjournment of the County Court and Circuit Court of Cullman County the sheriff and the clerk of said courts shall file with the Court of County Commissioners of said county, a statement of all cases finally disposed of, where the State fails to convict, or in which defendants have been convicted, and have been proven insolvent by the return of execution, 'No property found,' or in cases in which the State enters a nolle prosequi, or where the indictment has been withdrawn and filed, or the prosecution abated by the death of the defendant, showing the items of cost due them, the name of the defendant, and the charges against them. Said statement shall be sworn to by the officer making same. If the court finds the account correct they shall order a warrant drawn on the County Treasurer for the amount of such account. And in all such cases disposed of since September 25, 1915, where said fees have not been paid, such statement shall be filed by the sheriff and clerk, with the court of county commissioners within ninety days after the passage of this Act. And it shall be the duty of the county treasurer to pay the same out of the general fund of said county."

The laws of costs and fees are penal in their nature and must be strictly construed. See 109 Ala. 162, 3 Ala. App. 511, 192 Ala. 12.

Premises considered, it is my opinion that unless the claims of the sheriff and clerks are itemized, the payments must necessarily be held invalid.

Your fourth question must be answered in the negative. (See answer to third question).

In reply to your fifth question, I wish to advise that as I understand the term "proper exhibit" here referred to refers to an exhibit constituting part of an examiner's report. In my judgment, this question addresses itself to the Department of the Examiners and not to the Attorney General. However, if upon examination of the items of costs making up the "lump sum," they are found to be illegal, then, of course, such claims might be set up properly in the examiner's report.

In my opinion, your sixth question must be answered in the affirmative. The law provides definitely that the claims referred to should be itemized. (See answer to third question, supra). Unless the claims are itemized, they cannot be legally paid.

Neither the County Commission, nor the Judge of Probate, nor the County Treasurer has a right to recognize and treat as payable an improperly presented claim. And if and when any of the above named officers treat as payable and cause to be paid such claim, they must necessarily become liable on their official bonds. In my opinion, however, the fact that the claims were improperly presented does not ipso facto render the claim against the county void ab initio. An examination of all the records concerned would show whether or not the items making up the "lump sum" charges as a claim and honored by the officials herein named were legal. I refer you to the case of Carnley v. Moore, 214 Ala. 114, and the case of Carnley v. Moore, 211 Ala. 274.

For answers to your questions numbered 7, 8 and 9, I refer you to an opinion of the Attorney General rendered to the Treasurer of Chilton County, Clanton, Alabama, reported in the Biennial Report of the Attorney General 1928-30, page 589 and to Biennial Report of the Attorney General 1930-32,

pages 239 and 179 (and authorities cited therein). See also the case of Mobile County v. Williams, 61 So. 963.

Yours very truly,
A. A. CARMICHAEL
Attorney General.

March 5, 1936.

Hon. Chas. W. Lee,
State Comptroller,
CAPITOL.

Statutes--certain provisions of the Local Acts of Lamar County (Acts 1896-97, p. 34 and Local Acts 1903, pp. 9 and 717) relative to the payment of State witness fees and the transfer of funds from the Fine and Forfeiture Fund to the General Fund are repealed by implication by the enactment of general laws covering the entire field of the subject-matter of the provisions of said Local Acts.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of November 13, 1935, in which you enclosed a request of Assistant Examiner of Accounts Kirk, which is as follows:

(1) Section 1 of the Act approved Dec. 3, 1896, (Acts 1896-97, p. 34) requires the Court of County Commissioners to appropriate not less than $350.00 or more than $500.00 from the general fund at each regular term in February and August, to be used to pay state witnesses in criminal cases before the grand jury and in trials in the circuit court of Lamar County (not in the County Court--Sec. 9). Act approved October 1, 1903 (Local Acts 1903, p. 717) requires the Commissioners Court to appropriate at each regular term in February and August from the general fund a sufficient amount to pay state witness certificates issued by the judge of the county court. Sections 3 and 4 of the Act approved December 3, 1896 and Act approved October 1, 1903 also provide that state witness certificates issued for attendance at circuit and county court and before the grand jury shall be paid by the county treasurer upon presentation from the funds provided as described above, without further endorsment, if presented within 6 months after date issued, and if not presented within this time the same shall be forever barred; and that amounts of such witness fees shall be charged against defendants, when convicted and collected as costs, and when collected shall be paid into the county treasury to supplement the above-mentioned funds.

"The general laws (Section 3762-73 Code 1923) contain no provisions for appropriations from the general fund for payment of state witness fees, and Section 3769 provides that it is the duty of the clerk of the court to issue a certificate to each witness appearing on the part of the state, stating such facts, which under provisions of Section 3765 make it a claim against the county, which certificate is payable out of the fines and forfeitures in the county treasury. In opinion rendered Sept. 9, 1931 (1930-32 p. 440) the Attorney General held that, except when state witness claims are payable from the fine and forfeiture fund on account of return of "no property found" on executions for costs, in which cases the claims must be presented within 10 years from date of the judgment, there is no

legal limitation upon the time when such claims may be presented for payment.

"In view of the above-

"(a) Have provisions of the local acts mentioned above, for appropriations from the general fund for the purpose of paying state witness claims been repealed?

"(b) Have provisions of said acts limiting the time when state witness claims may be presented for payment been repealed?

"(c) In Lamar County is it necessary that the clerk of the court certify to the facts which make a claim payable from the fine and forfeiture fund before such claim may be legally paid from such fund?

"(2) Local act approved February 3, 1903 (Local Acts 1903, p. 9) requires the county treasurer to transfer to the general fund on April 1, 1903 and every three months thereafter any balance to the credit of the fine and forfeiture fund in excess of $100.00. The general law (Section 304 Code of 1923) provides that any balance in the fine and forfeiture fund at the end of the fiscal year in excess of registered and lawful claims or charges against said fund may be transferred by the county treasurer to the general fund or any special fund to which a resolution of the court of county commissioners, spread on the minutes of the court, may direct.

"(a) Has the provision of the local act regarding the transfer of balances in the fine and forfeiture fund been repealed?"

I am of the opinion that inquiries 1(a) and 1(b) should be answered in the affirmative.

The Codes of 1907 and 1923, and subsequently enacted laws provide for the payment of witnesses throughout the State in general. These provisions cover the whole field of the subject-matter relative to the amount of said fees, the method of their payment and from which funds they shall be paid.

The local laws in question deal with the specific mode of the payment of witness fees as applicable only to Lamar County, which is entirely different from the system as prescribed by the general laws of this State to be applicable to all of its counties.

The question then presents itself as to whether or not the provisions of the local laws in question are repealed by implication due to the enactment of general laws covering the whole field of the subject-matter of the provisions of the local laws. The rule applicable is stated in the case of Shepherd v. Clements, 224 Ala. 1, 141 So. 255, in which the court said:

"We recognize the rule that the presumption is a general act does not repeal a local statute, but, as has been well said, 'such presumption must give way to a plain manifestation of a different legislative intent.' The question is one of intention which may be made to appear by the subject-matter with which the general act is concerned, by the surrounding circumstances, by other legislation on the same subject, and the purpose to be accomplished. Thus, where the clear general intent of the Legislature is to establish a uniform system through the state, the presumption must be that local acts are intended to be repealed.-- 36 Cyc. 1089, 1090."

In this connection I also wish to refer you to the cases of Isbell v. State, 10 Ala. App. 639, 65 So. 706 and Allgood v. Sloss-Sheffield Steel & Iron Co., 196 Ala. 500, 71 So. 724; County Board of Education v. Browder, (MS.); and an opinion of the Attorney General rendered to the State Comptroller on August 7, 1935.

An application of the above rule to the instant case, leads me to the conclusion that the provisions of the Local Act under consideration are repealed by the adoption of the Codes of 1907, 1923, and subsequently enacted general laws which deal at length and cover the entire field of the subject-matter of the provisions of the Local Acts. This position is strengthened by the fact that the Legislature enacted a Local law for Lamar County in 1932 (Local Acts 1932, p. 55) which provides that said fees in criminal cases should be preferred claims against the fine and forfeiture fund of the county. This shows an additional legislative intent that the payment of witness fees in criminal cases should be governed by the general law.

Since the Local Acts in question have been repealed by implication, it naturally follows that inquiry 1(c) should be answered in the affirmative. Sections 3766 and 3769 of the Code of 1923, specifically provide that the clerk certify that the claim is properly payable from the fine and forfeiture fund before a claim can be paid from that fund.

I am of the opinion that your inquiry 2(a) should be answered in the affirmative. The rule as to repeal by implication, as above set forth, is likewise applicable to this inquiry. The provision of the general law providing for the transfer of moneys from the fine and forfeiture fund to the general fund is governed by Section 304, Code of Alabama, 1923. This is a general provision applicable to all counties, and in my opinion, was intended to cover the whole field of the subject-matter of the transfer of funds from the fine and forfeiture fund to the general fund. It, therefore, follows that the Local Act in question, providing for a specific mode of transfer of moneys from the fine and forfeiture fund to the general fund, is thereby repealed by implication.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 5, 1936

Hon. T. W. Thagard,
County Solicitor, Butler County,
Greenville, Alabama.

Licenses- Peddlers of Medicine-

A person not having a fixed place of business but who goes to various places and sells his product is an itinerant vendor or peddler of medicine.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of some time ago, stating:

"The License Inspector of this county has cited a man for failure to take out a drug peddler's license, which is required under Schedule 104 of the 1935 Revenue Code.

"The Inspector has received a letter from an Attorney who says that he represents the man who was cited, in which the attorney says as follows: 'The facts in this case are as follows: C. A. Darby manufactures this medicine or has it manufactured under his formula and he then sells it at various places in the state. He has applied to the Judge of Probate here for a state license and has been advised that there was no provision for a license for selling medicine so long as he was not peddling it. Darby does not peddle his medicine, but has regular places at which he does business just as though he had a store or other place of business, and all his transactions in connection with his preparation are had at this place. In your county he goes to the school building in Georgiana, has been going there for some time, and he in turn donates a percentage of his sales to the school, he also pays the licenses required by the Town of Georgiana. In the recent Revenue Code I fail to find any provisions for a license for selling medicine other than peddlers'.

"The License Inspector informs me that as far as he knows the man Darby sells medicine in this county only at the colored school in Georgiana, but that both white and black people go to the school and buy it from him. I am not informed whether he makes a speech or passes out printed matter in order to sell his preparation but, assuming that he does not, is he liable for a peddler's license under Subdivision B of Schedule 104 of the License Code?

"Your opinion in this matter is requested because of the fact that I shall probably be called upon to prosecute him in the County Court if he fails to take out the license."

Schedule 104, subsection (b) levies a license on each itinerant vendor or peddler of medicine, etc. From your statement it appears that this party has no fixed place of business but goes to various places in the State and sells his products. It would appear that he is an itinerant vendor or dealer, even though he sells only at one place, to wit, a negro school house in your county.

You state that this matter will probably come up in court and, of course, the full facts can there be ascertained.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 5, 1936.

Hon. Chas. W. Lee,
State Comptroller,
CAPITOL.

Courts of County Commissioners--Duty to pass on claims.

1. Under the Act of 1874, p. 513, General Acts, Section 3 of said Act the Board of Revenue of Montgomery County may delegate to its clerk or to some member of the Board of Revenue the power or authority to sign warrants in the name of the Board of Revenue for claims which have been allowed by said Board.

3. Claims that have not been presented and allowed by the Board of Revenue of Montgomery County unless the claims are fixed by law should not be paid.

4. Acts 1920, page 148, placing the entire charge of public roads, highways and bridges of Montgomery County in the hands of County Engineer is constitutional and valid.

5. Although the Act is constitutional, it does not give the Road Engineer the right to approve claims for payment without first being presented to the Board of Revenue, audited and passed by the same, and the payment of such claims without first being passed on by the Board would make such claims illegal and chargeable to said Board.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of November 13, 1935 in which you request my opinion as follows:

"1. Has the Board of Revenue of Montgomery County the right to delegate the authority to any person other than a member of the Board to sign warrants for the withdrawal of funds from the County Depository?

"2. Has the Board of Revenue of Montgomery County the right to delegate the authority to any person, other than a member of the Board to sign any certificate of indebtedness binding the county to pay and pledging the credit of the county for such payment?

"3. Is a claim against Montgomery County legal that is paid prior to being presented to the Board of Revenue and allowed, and is it necessary to have a minute entry showing the allowance of all claims including salary claims fixed by law, the Road Engineers or the Board of Revenue?

"4. Is the Act of 1930, page 148, placing the entire charge of public roads, highways and bridges of Montgomery County in the hands of any person other than the Board of Revenue constitutional?

"5. If this Act is constitutional, does it give the Road Engineer the right to approve claims for payment without being presented to the Board and if a claim is paid under these circumstances which is determined to be an illegal claim, who is liable, the party who approved the claim or the party signing the warrant?"

The Board of Revenue of Montgomery County was established by an Act of the Legislature approved November 18, 1874, Acts of Alabama 1874-75, page 513, and while this Act has been amended several times, the power conferred on this Board by Section 3 of said Act seems to remain as it was originally passed. This Section confers almost unlimited power on said Board and is as follows:

"That said board shall have power and authority to direct and control the property of the county as it may deem expedient, according to law; to levy a general tax for general, and a special tax for particular county purposes, according to the provisions of the Revised Code of Alabama; to examine, settle and allow all accounts and claims chargeable against the county; to examine and audit the accounts of all officers having the care, management, collection or disbursement of money belonging to the county, or appropriated for its use and benefit; to have exclusive control of the convict labor of the county and the disbursement of the proceeds of the same, and the sole right and authority to bind the county of Montgomery on any contract for the payment of money."

You will note this Section says among other things:

"That said Board shall have power and authority to direct and control the property of the County as it may deem expedient according to law."

From the above paragraph, I am of the opinion the Board may, if it sees fit by proper resolution made and entered on the minutes of said court, delegate the power to sign warrants to its clerk or any member of the Board. The drawing of warrants after the Board has passed on a claim is a mere clerical or ministerial act.

Request number 2, I am not answering for the reason that the party making this request has withdrawn the same so far as Section 2 is concerned.

Answering your third inquiry, I will have to answer the same in separate paragraphs. Answering the first division of Section 3, which is: "Is a claim against Montgomery County legal that is paid prior to being presented to the Board of Revenue and allowed?" I call your attention to Section 6755 Code of Alabama 1923, Subsections 4 and 5, which are as follows:

"4. To examine, settle, and allow all accounts and claims chargeable against the county."

"5. To examine and audit the accounts of all officers having the care management, collection or disbursement of money belonging to the county, or appropriated for its use and benefit."

I also call your attention to Section 224 of the Code of 1923 which provides:

"The court of county commissioners must, in term time, audit all claims against their respective counties; and every claim, or such part thereof as is allowed, must be registered in a book kept for that purpose; and the judge of probate must give the claimant a warrant on the treasury for the amount so allowed; but bonds and interest coupons evidencing interest on such bonds, lawfully issued by the county, shall not be required to be registered or to be proved nor shall warrants be required to issue therefor, but in addition to all other privileges, shall be held to enjoy all the privileges of registered warrants from the date of their lawful issue, and shall be held to be allowed claims from the date of their lawful issue."

Section 228 provides that claims not presented within twelve months are barred.

It is my opinion that these sections contemplate the presentation to an allowance by the Court of County Commissioners or Boards of Revenue of all claims against the County except those hereinbelow excepted before the same can be validly paid.

Cf. Mobile County v. Williams, 180 Ala. 639.

In answer to the second division of question number 3, which is: "Is it necessary to have the minute entries show the allowances of all claims, including salary claims fixed by law, the road engineer or Board of Revenue?" It is my opinion that the minutes of the Board should show the allowances of all claims except such claims as are fixed by statute or resolution of the Board.

See Opinion of Attorney General, Office Edition, addressed to Mrs. Willie L. Miller, Custodian of County Funds, Chapman, Alabama, January 9, 1936.

Your fourth request asks my opinion on the validity of an Act of the Legislature approved October 6, 1920, (General and Local Acts 1930, p. 148). This is a general act with local application applying only to Montgomery County. I have read the Act carefully and the same appears to be constitutional and valid. The caption contains only one subject and is in compliance with Section 45 of the Constitution of 1901 in my judgment.

State ex rel. Winters v. Sayre, 118 Ala. 1, Ex Parte Pollard, 40 Ala. 77. In construing an Act as to the sufficiency of the caption, "the conclusion should be reached by liberal construction."

In answer to your fifth request, it is my judgment that the Act cannot be construed to take from the Board of Revenue its duty and authority to pass on all claims against the county not fixed by law. It is true that Section 4 of said Act in designating the powers of the County Engineer is very broad and comprehensive, the opening paragraph reading as follows:

> "Section 4. That the said County Engineer, herein provided for, shall have entire charge of the public roads, highways and bridges in the county in which he holds office, and shall employ such assistants and help as is necessary for a full satisfactory performance of the duties of his office."

However, in my judgment, this does not clothe the County Engineer with the power and authority to approve claims for any purpose that are to be paid by the County and have the same paid without such claims having first been audited, paid and allowed by the Board of Revenue. It is true that the Engineer can employ such help as may be deemed advisable by him, but the payment of such help or the auditing and allowance of claims therefor must be done by the Board.

It is my opinion that if claims of this character are paid without the same being audited, passed and allowed by the Board, it would make them chargeable to the Board. The power to audit and allow claims payable by the County is a duty placed on the Court of County Commissioners or Board of Revenue, and this duty, in my judgment, is one which cannot be delegated. Mobile County v. Williams, supra.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 7, 1936.

Hon. Fleetwood Rice,
Judge of Probate,
Tuscaloosa County,
Tuscaloosa, Alabama.

Paying of license prescribed in Schedule 36.2 of General Revenue Act, 1935, does not relieve haulers of coal from complying with Act No. 159, approved October 28, 1932.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of January 14, 1936, reading as follows:

> "A truck owner engaged in hauling coal for hire from mine to consumer has procured a license under Schedule 36.2 on page 19 of com-

pilation of licenses or Privilege Tax as compiled and indexed by Harry Simon, Chief Clerk.

"He has been arrested because he did not have a Carrier License as provided by Act No. 159 defining contract carriers and common carriers not subject to the provisions of the Alabama Motor Carrier Act of 1931.

"Please advise immediately on the following question:

"Does a truck owner engaged in hauling coal for hire from mine to consumer and who has procured a privilege license under said Schedule 36.2 also have to procure a carrier license under said Act No. 159?"

Schedule 36.2 on page 19 of the compilation of license or privilege tax to which you refer is Schedule 36.2, Section 348, of General Revenue Act, page 453 of General Acts Alabama, 1935, and Act No. 159 is an Act of the Legislature of Alabama approved October 28, 1932, hereinafter referred to as the "1932 Act."

I assume from your statement of facts that the truck owner is otherwise subject to the 1932 Act and that the only question involved is whether or not the payment of the license tax prescribed in Schedule 36.2 of the 1935 Act exempts him from qualifying as a motor carrier under the 1932 Act. As so limited, I am of the opinion that the truck owner must pay licenses under both acts.

I find nothing in the 1935 Act which expressly repeals any part of the 1932 Act involved in this question. Therefore, if such Act is repealed as to those who transport coal, it must be by implication.

The Alabama Supreme Court said in Alford v. Claborne, et al., 229 Ala. 401, 157 So. 226:

"It is of course well understood that repeal by implication is not favored, and that nothing short of an irreconcilable conflict between two statutes works such result. **State v. White,** 160 Ala. 168; 49 So. 78; **City of Birmingham vs. Southern Express Co.,** 164 Ala. 529, 51 So. 159. Or as otherwise expressed, both statutes will be permitted to stand if it can be done upon any reasonable construction. **Ferguson v. Commissioner's Court of Jackson County,** 187 Ala. 645, 65 So. 1028; **City of Mobile v. Mobile Electric Co.,** 203 Ala. 574, 84 So. 816; **Ex Parte Jones,** 212 Ala. 259, 102 So. 234."

Therefore, unless the 1935 Act is in conflict with the 1932 Act, the latter Act remains in full force and effect as to those who transport coal, regardless of the license imposed by the 1935 Act.

The only assessments under the 1932 Act are an application fee of $10.00, (Section 6) and a mileage tax, (Section 22). These seem to be the only provisions of the 1932 Act with which Schedule 36.2 of the 1935 Act conflict. The fee of $10.00 is clearly an application fee for the issuance of the permit provided in the Act and could not be considered a "license" and, as such, in conflict with the subsequent Act.

The mileage tax referred to above was prescribed by the legislature "as compensation for the use of the public highways for each mile actually operated within the State over such public highways" and was specifically prescribed "in addition to all property, franchises, licenses, or other taxes, fees and charges now or hereafter provided by law". (Section 22 of the Act).

Accordingly, it is my opinion that there is no conflict between the two Acts and that they both remain in full force and effect as to persons transporting coal, as described by you.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

March 7, 1936.

Hon. John T. Frazer,
Judge of Probate, Lee County,
Opelika, Alabama.

Sections 1397 (50), 1397 (51) of the Highway Code of 1927 supersede and repeal Sections 3324 and 3325 of the Criminal Code of 1923 in so far as concerns offenses committed on the **highways.**

Opinion by Assistant Attorney General Loeb.

Dear sir:

I have your letter of February 3, 1936 in which you request my opinion as follows:

"I respectfully request your opinion as to whether Sections 1397 (50) and 1397 (51) of the Highway Code of 1927 supersede or repeal Sections 3324 and 3325 of the Criminal Code of 1923.

"In the event of a violation of this law, does the prosecuting witness have the right to direct under which statute the warrant shall be issued?"

In my opinion, Sections 1397 (50) and 1397 (51) supersede and repeal Sections 3324 and 3325 in so far as these sections relate to the offenses mentioned, where such offenses are committed **on the highways** within the State of Alabama.

Your attention is directed to the fact that Sections 1397 (50) and 1397(51) contain the phrases "upon any highway within the State" and "upon a highway," respectively. These phrases are not to be found in the sections of the Criminal Code dealing with like offenses. Sections 3324 and 3325 relate to the operation of motor vehicles, **generally,** and the specific mention of "highway" in Sections 1397 (50) and 1397 (51) serves to limit the scope of their operation.

For example, prosecution of persons driving while under the influence of intoxicating liquor or narcotic drugs, etc., or for reckless driving, where these offenses occurred on the **highways** of the State, must be had under Sections 1397 (50) and 1397 (51). While prosecution for offenses mentioned in Sections 3324 and 3325, and committed elsewhere than on the righways of the State, are to be governed by said sections.

The prosecuting witness has no authority to direct under which statute the warrant shall be issued, this matter being determined solely by the locality of the offense; i.e., whether on the **highways of the State** or elsewhere.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 7, 1936.

Hon. Vernon L. St. John,
Senator, 2nd District,
Hazelwood High School,
Town Creek, Alabama.

Constitution - Amendment authorizing five mill additional ad valorem tax on vote of people in Town Creek School District No. 59 proposed by Act of 1923 (General Acts 1927, p. 751) and proclaimed ratified November 15, 1924 (Proclamation Record D, page 107), authorizes use of proceeds of such tax for installation of pumps, water tank and drinking fountains for use in building.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of March 5, 1936 in which you request my opinion as follows:

"The Town Creek school system of Lawrence County has a five mill constitutional building tax voted on about 1923. We have constructed a new school building, with the aid of the PWA grant, from this money. This building has in it a sanitary system. As the town does not have water works, it is necessary to install a pressure pump and water tank to supply water to the system. The well is within ten feet of the building.

"I would like to get an official opinion as to whether money from this tax could be used to install a pump, water tank and drinking fountain in the building."

In my opinion, the constitutional building tax mentioned in your inquiry may properly be used to install a pump and water tank to supply water to the school sanitary system and to provide drinking fountains in the building.

The amendment mentioned in your letter was proposed by Act of 1923 (Gen'l Acts 1923, p, 751), proclaimed ratified November 15, 1924 (Proclamation Record D, p. 107) and provides as follows:

"XX. Town Creek School District No. 59, Landersville School District No. 23, and Moulton School District No. 28, in Lawrence County, Alabama, shall have the right and power by vote of a majority of the qualified electors of such district at an election held for that purpose to levy and collect for the purpose of acquiring, constructing or repairing of school buildings in such districts or paying for school buildings already built, a tax of not over five mills in any one year, in addition to all other taxes now authorized by law. The election in such district to determine whether or not such tax shall be levied shall be called, held and conducted as now provided by law for calling, holding and conducting of elections to determine whether or not a three-mill district school tax shall be levied and collected."

In an opinion to Hon. A. F. Harman, State Superintendent of Education, Montgomery, Alabama, February 11, 1932 (Office Edition, Opinions of Attorney General, Vol. 8, page 254), it was limited to "the uses mentioned." The "uses" mentioned in the amendment, it will be noticed, are the "acquiring", "constructing" or "repairing" of school buildings.

The word "construct" implies the fitting of an object for use or occupation in the usual way and for some distinct purpose.

Paterson etc. R. Co. v. Paterson, 86 Atl. 68 (N. J.) 12 C. J. 1295, N. 27.

The definition for "construct" as given by Webster's New International Dictionary is "to put together the constituent parts of (something) in their proper place and order; to build; form; make; as to "construct" an edifice.

In my opinion, the pump and water tank, when attached to the building in the permanent manner detailed by you, necessarily come within the meaning of the word "construct". For without provision for water, the installment of the sanitary plumbing, which clearly is included within the meaning of the term "construct," would be of no efficacy and the school building would not be fitted for "occupation in the usual way" under the above definition.

The drinking fountains "in the building" when connected to the general plumbing system, become a part of such system and may likewise be installed with the money derived from the five mill amendment, supra.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 7, 1936

Hon. M. K. Marshall,
Tax Assessor, Randolph County,
Wedowee, Alabama.

Tax Assessor Demand Fee-

It is the duty of the Tax Assessor to make demand after December 31 on all persons who have failed to make return of their taxable property for assessment and to collect the demand fee of 50c as required and provided by Section 41 of the Revenue Act of 1935.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of February 15th, in which you state:

"Is it compulsory that I charge an assessor's fee for delinquent assessments since I am on a fee basis. I do not want to charge this fee unless it will be a legal charge against me.

"Also advise me if it is compulsory that the Tax Collector collect the delinquent fee where same is paid although delinquent but a demand has not been made."

In reply, I call your attention to Section 41 of the Revenue Act of 1935, which provides:

"Section 41. After the thirty-first day of December in each year, the Assessor shall in person or by deputy, make a demand upon all taxpayers who have failed to make return to him for a list of their taxable property, and such demand may be made by written notice left with the taxpayer at his residence or place of business, or sent postpaid by registered mail, with return receipt demanded, to the taxpayer's last known place of residence and it shall be the duty of such taxpayer to return such list to the Assessor on or before the third Monday in January following. For making this demand the Tax Assess-

or shall be entitled to a fee of fifty cents to be paid by the taxpayer, which shall be added to the tax receipt and collected with the tax."

You will note that by this provision the Tax Assessor is required to make a demand upon all taxpayers. This is a mandatory duty which he must do. It would follow that if he makes the demand, the fee accrues. Ordinarily the charging of the fee would be a matter with which the Tax Assessor is alone concerned, but by virtue of Section 23, the earnings of the Tax Assessor are definitely limited and all excess over the amount fixed for his compensation and the expenses as fixed, is payable into the County Treasury. It is therefore my judgment that the fee should be charged in all cases.

In answer to your second inquiry, I call to your attention opinion appearing in the Quarterly Report of the Attorney General at page 330.

Yours very truly,
A. A. CARMICHAEL,
Attorney General

March 7, 1936.

Hon. S. L. Johnson,
Clerk and Register Circuit Court,
Calhoun County,
Anniston, Alabama.

In cases where there are more than one defendant tried and convicted under one complaint or indictment, there should be a separate sentence for each defendant, but this should be a part of one general judgment. Therefore, in charging bill of costs only one final judgment should be included.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of sometime ago, in which you request my opinion as follows:

"Please give your opinion on the following question:

"In a criminal case where there is more than one defendant and there is no severance, the Court sentences the defendants separately and the clerk enters in the minutes a separate sentence.

"Question: is it proper to charge in the cost bill more than one final judgment?"

Certainly there should be two separate and distinct sentences of each defendant, but this should be contained in one and the same judgment entry and should therefore be a part of the final judgment. Therefore, the bill of costs should contain only one final judgment. Quarterly Report, Attorney General, October - December, 1935, page 148. This opinion is to Hon. Hamp Draper, October 31, 1935.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 7, 1936.

Hon. Eugene B. Henry,
Commissioner of Licenses,
Jefferson County,
Birmingham, Alabama.

Money Lenders--Statutes--Act of 1927 at page 264, regulating business of persons making small loans in counties of 200,000 and over population and levying license therein, is not repealed by Schedule 93½ of Revenue Act of 1935.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter stating:

"Under Schedule 93½.2 of Revenue Acts of 1935 it provides as follows: 'Each person engaged in business of lending money or making industrial loans shall pay an annual license of one hundred dollars for each county in which they engage in business. Section 3 of this same schedule has the following provision:

"Provided however that if an office is maintained in more than one county, the license shall be one half of the above license payable in each additional county where an office is maintained.'

"Does this provision of section 3 apply to persons making application for license under section 2 and if so would I collect one half the amount for State and one half amount for County.

"I would like to know if Schedule 93½ of 1935 Acts repeals House Bill 907 page 264 of 1927 Acts."

I enclose copy of opinion to Hon. W. W. Hill, Probate Judge of Montgomery County, which fully answers your first question.

I am further of the opinion that House Bill 907 appearing at page 264 of the General Acts of 1927, is not repealed by Schedule 93½. The 1927 Act though levying a license is clearly by its terms a regulatory Act of limited application, whereas Schedule 93½ is an ordinary license Act for revenue purposes of general incidence. There is a field of operation for both, in my opinion.

Yours very truly,
A. A .CARMICHAEL,
Attorney General.

March 7, 1936.

Hon. Joseph E. Jones,
County Solicitor, Conecuh County,
Evergreen, Alabama.

Solicitors - excess of solicitor's fees collected in County Court of Conecuh County in any one year cannot be used to supplement deficiency of fees collected in other years, said fees being used for the payment of the compensation of the County Solicitor, (Local Acts 1919, p. 206, Local Acts 1923, p. 109).

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of February 5, 1936, which is in part as follows:

"The Act creating the office of County Solicitor of Conecuh County and fixing his salary will be found in Local Acts of 1919, page 206. An Act amending Section 5 of the original Act of 1919 will be found in Local Acts 1927, page 109.

"I would like an opinion on Section 5 as amended in 1927 as to whether or not when the fees paid into the County Treasury out of which the solicitor's salary is paid is less than $2400.00 in any one year and the fees paid into the County Treasury in any succeeding year amounts to more than $2400.00, can excess fees collected in any succeeding year be drawn by said solicitor as salary and applied to the payment of his salary for the year in which said fees were insufficient to pay the salary of $2400.00 per year."

I am of the opinion that your inquiry should be answered in the negative.

The office of County Solicitor of Conecuh County was created by Act No. 462, H. B. 771, approved September 26, 1919 (Local Acts 1919, p. 206). Section 4 of said Act provides for the taxing of solicitor's fees in criminal cases in the county court in the same manner as in the circuit courts of this State, said fees to be paid into county treasury. Section 5 of said Act provides for the compensation of the County Solicitor and the manner of payment. Section 5 was amended by Act No. 188, H. B. 617, approved July 29, 1927, (Local Acts 1927, p. 109). Section 5 as amended, provides as follows:

"Section 5. That such solicitor shall receive as compensation for his services twenty four hundred dollars per annum, to be paid to him in monthly installments by the county depository of said county out of the fees taxed against defendants, as provided for in the last preceding section of this Act; provided that, the fees so taxed and paid to the county depository of said county during the year shall amount to twenty-four hundred dollars; but if they do not, then and in that event, said Solicitor shall only receive the fees that have been so taxed and paid to the County depository of said County. If, at the end of the year, the fees so taxed and paid into the county depository of said county shall exceed twenty-four hundred dollars, the excess shall be paid out in the same manner as any other moneys belonging to said fund are paid out.

It will be noted from the above that the compensation of the County Solicitor is contingent upon the amount of solicitor's fees taxed and paid into the county depository during the year. In other words, if the amount of fees collected in any year is not sufficient to pay his compensation in full for that year, he only receives the amount so collected. It will also be noted that if the amount of fees collected are in excess of the maximum compensation allowed, **at the end of the year** the excess is paid out in the same manner as other moneys belonging to said fund are paid out.

The premises considered, it is my opinion that the excess of the fees collected in any one year cannot be used to supplement a deficiency of another year in the compensation of the County Solicitor in question.

Yours very truly
A. A. CARMICHAEL,
Attorney General.

March 9, 1936.

Hon. Fleetwood Rice,
Judge of Probate, Tuscaloosa County,
Tuscaloosa, Alabama.

County should pay its pro rata share of advertising expense where Constitutional Amendment affects county individually.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of February 6th, 1936 in which you request my opinion as follows:

> "We have received, duly certified, from the Comptroller's office a claim in favor of the State of Alabama against Tuscaloosa County for $1520.56, being one-half of the cost in publishing Governor's Proclamation No. 4 pertaining to Calhoun and Tuscaloosa Counties.
>
> "This bill pertains to the submission of a Constitutional Amendment which affected Calhoun and Tuscaloosa Counties only.
>
> "Will you please advise whether or not this is a legal charge against the General Fund of Tuscaloosa County and is its payment authorized by law."

I am of the opinion that Tuscaloosa County should pay one-half of the expenses under the circumstances stated. Section 233 of the Code of Alabama of 1923 provides:

> "Whenever an amendment to the Constitution of Alabama, affecting only a county or a subdivision of a county or a municipality, is submitted to the people for ratification or adoption, the county to which amendment relates, or affects, shall pay the expenses of the publication of the Governor's Proclamation concerning such amendment....".

In the present instance, the amendment affects Tuscaloosa County only, and Calhoun County only. That is, it does not affect the two counties **jointly,** but affects them individually.

As far as Tuscaloosa County is concerned, the effect of the amendment would be the same, if reference to Calhoun County were omitted. The Amendment is applicable to each county as a unit. It was merely for convenience and to save expenses that the two were included in one amendment. The situation would be different if the amendment affected the two counties jointly.

As the amendment affects the counties equally, each should pay a pro rata share. This is a legal charge against the General Fund, and payment is not only authorized but required. (Section 233, supra).

Very truly yours,
A. A. CARMICHAEL,
Attorney General

March 9, 1936

Hon. Gaston Scott, President,
State Highway Commission,
Montgomery, Alabama.

Highways—Telephone Company in City of Birmingham not liable for costs in moving its lines and conduits under Project WPGM-384, the work being done by the State Highway Department.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of January 31, 1936, together with other data, relative to project WPGM-384 - 5 th Ave. South, Birmingham, Alabama, (S. A. L. Railroad). In connection with this project you state that in the construction of an underpass the lines and conduits of the Southern Bell Telephone and Telegraph Company will have to be moved. The work is to be done by the State Highway Department with Federal Funds.

In view of the above you request my opinion as to whether or not the Southern Bell Telephone and Telegraph Company, under the general law or under the franchise you enclosed, would be liable for the costs of moving the lines and conduits in question.

I am of the opinion that your inquiry should be answered in the negative.

This office has heretofore ruled that there is no liability upon street railway companies for the cost of moving their tracks under the general law when the work in question is done by the State of Alabama. **Opinion of Attorney General to President, State Highway Commission, on August 1, 1935; Quarterly Report of Attorney General, Vol. 1, pp. 114, 192 and 318. In my opinion, telephone companies are in the same category with street railway companies in this respect.

An examination of the enclosed franchise fails to reveal wherein the Southern Bell Telephone and Telegraph Company would be liable for the cost of moving its lines and conduits in the project under consideration when the work is done by the State Highway Department.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 9, 1936

Hon. Gaston Scott, President,
State Highway Commission,
State Capitol,
Montgomery, Alabama.

Road to convict camp should be condemned by state and not by county.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I have your letter of February 27th, 1936, requesting my opinion as follows:

"At the convict camp now being constructed near Cropwell we need a right of way for an additional road entering the camp to reduce travel distance working southwest. We were told when the site was selected that this could be arranged.

"It now develops that the county will have to condemn this right of way and since it is a matter of ingress to our camp Probate Judge M. W. Forman, St. Clair County, states that he is willing to condemn and pay the cost of the award but questions his right to condemn in this case and thinks the State should condemn in this case at the county's expense.

"Please give us your opinion on the above question."

In reply, I advise that the legislature has provided in Section 7477 of the Code of 1923 a method for condemning land for convict purposes which should be followed in this case. Under this section, the proceedings should be brought in the name of the state.

The state is not authorized to condemn this land and charge the cost of same to the county, as the convict camp is a state camp and is not primarily for county purposes. It would be proper, however, for the county to contract with the state to pay the expenses provided such contract was made by the court of county commissioners or board of revenue for any of the purposes set forth in Subsection 23 of Section 6755 of the Code of 1923, as amended (Acts 1931, pages 759-762). Cf. **Stone v. State,** 223 Ala. 426, 136 So. 727.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 9, 1936

Hon. Chas. W. Lee,
State Comptroller,
CAPITOL.

Constitutional Amendment--

Whenever an amendment to the Constitution of Alabama, affecting only a county or a subdivision of a county or a municipality is submitted to the people for ratification or adoption, the county or municipality which said amendment affects, shall pay the expense of the Governor's Proclamation concerning such amendment.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of February 3, 1936, in which you ask:

"Are counties and municipalities responsible for expenses of Governor's Proclamation submitting amendments for ratification when

such amendment relates to or affects only the county or municipality as provided in Section 233 of the Code of 1923."

It is my opinion that your question should be answered in the affirmative.

I call your attention to Section 233 of the 1923 Code of Alabama, which is as follows:

"233. Payment for publication of governor's proclamation submitting proposed amendment to constitution, affecting county or subdivision thereof.—Whenever an amendment to the constitution of Alabama, affecting only a county or a subdivision of a county or a municipality, is submitted to the people for ratification or adoption, the county to which such amendment relates, or affects, shall pay the expense of the publication of the governor's proclamation concerning such amendment, and the court of county commissioners or board of revenue of the county where such amendment relates to a county or a part thereof, and the auditor, clerk, mayor, or other officer having authority to draw warrants on the treasury of such municipality, when such amendment relates to a muncipality, shall, upon the presentation of a claim for the necessary amount to be paid, by the state for such publication, certified by the state auditor, make an order and draw a warrant payable to the state treasurer out of the funds of the said county or municipality as the case may be, and the custodian of the county funds or municipal funds as the case may be, shall pay the amount of said warrant to the treasurer of the State of Alabama."

It is my opinion that Act No. 365, S. B. 499, approved July 10, 1931, (General Acts 1931, p. 430) which provides as follows:

"Section 1. Unless otherwise stated in the Act or Resolution calling such election, whenever any special election is ordered by the Legislature upon any proposed amendment or amendments to the Constitution of this State, and said amendment affects only one municipality in this State, then if such municipality **has as much or more than 68,000 and under 200,000** inhabitants according to the last or any subsequent Federal Census, and if no amendment or amendments other than those affecting said municipality are submitted to the voters of the State at said election, the expense of holding such election, including the cost of publishing the notices and proclamation required by the Constitution, shall be paid by **such municipality.**

"Section 2. It shall be the duty of the State Auditor to ascertain the expense of such election, and within thirty days after the holding of the same, to present to and file with the Clerk of such municipality, a statement of said expense, duly certified by such officer, and the governing body of such municipality, by whatever name called, shall cause said expense to be paid out of the funds of the municipality to the Treasurer of the State of Alabama. Every such claim shall be a preferred claim against such municipality, and the courts may enforce by writ of mandamus performance of the duty herein entailed upon the Auditor and the members of the governing body of such municipality.

"Section 3. This Act shall be in force and effect on its passage and approval."

does not affect Section 233, supra, as both Acts have a field of operation and should be construed together.

For your information, I enclose a copy of an opinion of this office to Hon. Fleetwood Rice, Judge of Probate of Tuscaloosa County, rendered March 9, 1936.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 9, 1936

Hon. Sam Aston, Chairman,
Barber Commission of Jefferson County,
Birmingham, Alabama.

Unemployment Compensation Act--
Barbers working strictly on Commission basis, furnishing own instruments etc., but using employer's chairs and sanitary equipment, held included under Act, and not independent contractors.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of February 19, 1936, in which you request my opinion as follows:

"On February 18 an article appeared in one of the leading Birmingham papers, stating that Independent Contractors and Insurance agents working strictly on commission are not included under the unemployment insurance act.

"Being Chairman of the Barber Commission of Jefferson County, I have been questioned many times, if this would apply to the barbers who work in shops with eight or more employees, who work strictly on commission basis."

In my opinion barbers, though working strictly on a commission basis, are included under the Unemployment Compensation Law, (General Acts, 1935, page 950) where such barbers work in shops employing eight or more persons.

I assume, of course, that the barbers mentioned in your request furnish their own instruments, etc., but are supplied with chairs and sanitary equipment, which, it appears, is the customary course of business in the barber profession.

Section 2, subsection (g) of the Unemployment Compensation Law, supra, defines "employment" as:

" 'Employment' means any employment in which all or the greater part of the person's work (within the continental United States) is or was customarily performed within this State, under any contract of his, oral or written, express or implied, whether such person was hired and paid directly by the employer or through any other person employed by the employer, provided the employer had actual or constructive knowledge of such contract. Such employment shall include the person's entire employment (in all states, including the District of Columbia). In the case of all other persons employed partly in this state and partly in other states, the commission is authorized, with the approval of the Governor, to enter into reciprocal arrangements with other states as to

the extent the employment of such persons shall be included under this definition."

This office in an opinion to the Hon. J. L. Kaufman, Chairman, Unemployment Compensation Commission, Montgomery, Alabama, February 17, 1936, ruled that an independent contractor does not come within the above definition.

The question presented by your inquiry, therefore, devolves into the single point as to whether a barber, working under a setup similar to that assumed above, is an "independent contractor" or an "employee".

As to the determining factors to be considered in this connection, I quote from the Kaufman opinion, cited supra:

"As to what factors are to be considered in determining whether a person is an independent contractor, the Alabama Supreme Court in the case of Birmingham Post Co. v. Sturgeon, Supra, said:

" 'It is not possible to lay down a hard and fast rule or state definite facts by which the status of men working and contracting together can be definitely defined in all cases as employee or independent contractor. Each case must depend on its own facts. Ordinarily, no one feature of the relation is determinative, but all must be considered together.'

***

" 'This court has had occasion frequently to point out the distinguishing characteristics between the relation of an independent contractor and that of a servant. A clear and concise statement of such distinction is made in our case of Republic I. & S. Co. v. McLaughlin, 200 Ala. 204, 75 So. 962, to the following effect: The relation is "determined by whether or not the person from whom he is working' has control over the means and agencies' by which the work is done(citing cases), (and) or has control over the means and agencies 'by which the result is produced' (Harris v. McNamara, 97 Ala. 181, 12 So. 103). In line with this test is the rule that he is deemed the master who has the supreme choice, control, and direction of the servant, and whose will the servant represents, 'not merely in the ultimate result of his work, but in all its details' (Lookout Mt. I. v. Lea, 144 Ala. 169, 39 So. 1017)." For the person to be a servant the other party must retain "the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, not only what shall be done, **but** how it shall be done" (39 C. J. 35), as he has "a reserved control or direction of the work" (Alabama Power Co. v. Bodine, 213 Ala. 627, 105 So. 869). "Giving orders is the role of the Master." Alabama Power Co. v. Bodine, supra.'

"In the case of Martin v. Republic Steel Co., 146 So. 276, the court held that the criterion is not whether the owner did in fact exercise supervision, 'but rather did he have the right to do so; did he possess the power to control.'

"(See also General Refrigeration Sales Co. v. Taylor, 158 So. 314)."

It may be herein pointed out that the fact of payment on a commission basis does not make one an independent contractor. **Martin v. Republic Steel Company**, 226 Ala. 209; 146 So. 276.

In the Martin case the Court said:

"We are impressed with the idea that the work petitioner was performing for defendant, was what is commonly known as 'piece work' But, as observed by Mr. Honnold, in his Treatise on Workman's Compensation, vol. 1, page 213: 'It does not make one an independent contractor that he is to be paid for his service on a commission basis, by piece work, or by any particular mode of payment.' And it is so provided by our statute, section 7585."

Therefore, it may be stated that a workman using his employers tools or equipment (as a barber uses the chairs and sanitary equipment furnished by his employer), especially if of substantial value, is generally deemed an "employee" rather than an "independent contractor." **Mollinger v. Webster City Oil Company,** 234 N. W. 254 n. 7 (Iowa).

Accordingly under the assumed facts, it would appear that a barber is not an independent contractor but rather that he is an "employee", and therefore is included within the definition of employment set out in Section 2, subsection (g) of the Unemployment Compensation Law.

Premises considered, there can be no other conclusion but that a barber, working in a shop with eight or more employees under the conditions assumed above, is included under the Unemployment Compensation Act.

The opinion to Hon. J. L. Kaufman, supra, is commended to your attention for comparison and a copy is enclosed herewith for your convenience.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 9, 1936

Hon. L. W. Price,
Probate Judge, Conecuh County,
Evergreen, Alabama.

Transient Dealer - Blind person selling bananas to stores for resale subject to license.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of February 7, 1936, in which you request my opinion as follows:

"Please refer to Schedules 146 and 147, pages 244 and 248, Revenue Code of 1935, and render me an opinion as follows:

"Is a blind person who sells bananas, from a truck, to stores for resale subject to a State and County privilege license as a transient dealer?"

In my opinion, a blind person who sells bananas from a truck to stores for resale is subject to a State and County privilege license as a transient dealer. Schedule 147 of the Revenue Bill of 1935 defines a transient dealer, in part, as follows:

"(b) All persons acting for themselves or as an agent, employee, salesman, or in any capacity for another, whether as owner, bailee or other custodian of goods, wares and merchandise, and going from person to person, dealer to dealer, house to house, or place to place, and selling, or offering to sell, exchanging or offering to exchange, for resale by a retailer, any goods, wares and merchandise,****".

In an opinion of this office to Hon. W. C. Batson, Judge of Probate of Chambers County, LaFayette, Alabama, (Quarterly Report of the Attorney General, Vol. 1, page 53) it was held that the only exemption to disabled persons, other than disabled veterans, from peddler's license was that contained in Schedule 146 of the 1935 Revenue Act exempting blind persons "when baskets and push carts are the only methods of delivery used". I do not find that there is any exemption to a blind person who sells bananas from a truck where such products are not grown by himself or any member of his immediate household. Accordingly, the party mentioned in your inquiry is subject to a State and County privilege license as a transient dealer.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 9, 1936

Dr. H. G. Camp,
Physician-Inspector,
Board of Administration,
Montgomery, Alabama.

1. Where a prisoner escapes from the jail, the State will not pay for his feed for the month in which he escapes.

2. However, the county may pay such amounts as it may be due, provided the Commissioners Court is satisfied that the escape of the defendant was not caused by the connivance or negligence of the officer having him in charge.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of January 31, 1936, in which you request my opinion as follows:

"I have a bill for the feeding of Ed Rogers, who was convicted for Second Degree Murder in Cherokee County in August 1918. While confined in the county jail awaiting an appeal to the Supreme Court escaped on September 29, 1918.

"The State Auditor deducted twenty-nine days for his feeding from September 1918 feeding account, amount being $17.40.

"The prisoner was apprehended at Miles City, Montana, and returned to Kilby Prison on October 22nd, 1935.

"Mr. John F. Farrow, Ex-Sheriff of Cherokee County, from whose custody this prisoner escaped, is requesting payment for the amount deducted from his September 1918 feed bill.

"There is some question, due to the Budget and Financial Control Act, whether the State can pay this claim and your opinion is requested."

It is my opinion the said bill you refer to can never be paid by the State. I call your attention to Section 3750, Code of Alabama, 1923, and specifically to the latter clause of this Section, where it says:

"No sheriff must be paid out of the state treasury any fee or allowance whatever, on account of any prisoner who has escaped from his custody; but the commissioners court may, in their discretion, pay such fees and allowances as are payable by the county, notwithstanding the escape of the prisoner, if satisfied that such escape was not caused by the connivance or negligence of the officer having charge of him."

Biennial Report of Attorney General 1926-28, p. 99.

However, you will note from the above that the County may, through its Commissioners Court or courts of like jurisdiction, pay any amount due by the county provided it is satisfied that such escape was not caused by the connivance or negligence of the officer having him in charge.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 9, 1936.

Hon. H. C. Hayes,
Deputy Solicitor,
Jackson County,
Scottsboro, Alabama.

The law provides that the Grand Jury shall make examination of the books, accounts and bond of the different officers, I find no authority of law for this being delegated to a committee and if this is done and the committee works while the Grand Jury is recessed, there is no authority of law for paying them their per diem for the time which the Grand Jury was recessed.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 6, 1936, in which you request my opinion as follows:

"I should like to have your opinion on the following proposition:

"At the regular session of the Grand Jury the foreman of that body appointed a committee composed of certain of its members to make a special investigation of the county records. The committee was allowed three days to make its investigation, and during this period the Grand Jury, proper, was recessed. Are the members of the committee entitled to compensation for the three day period devoted to Committee work?"

In answering your inquiry, permit me to say that I know of no authority of law for the Grand Jury appointing a committee to examine the books and accounts of county officers. The law says this examination shall be made by the Grand Jury as a whole.

Section 8670, Code of Alabama, 1923, which is as follows:

"It is the duty of the grand jury to examine into the condition of the county treasury, and the bonds of all county officers, with regard to their

correctness and sufficiency, and to report upon the same; to inquire into all indictable offenses committed or triable within the county, which, as they may be advised by the court, are not barred by the lapse of time, or some other cause; and to perform such other duties as are, or may be by law required of them."

The Grand Jurors are supposed to be paid only while the Grand Jury is in session and if it recesses the whole jury is recessed and none can be paid their per diem. I find no authority of law for paying the members of the committee from the Grand Jury such as you describe for work done at a time when the Grand Jury was recessed.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 9, 1936.

Hon. W. W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Section 42 of an Act approved August 12, 1935, by Swift, where it provided the payment of 15c license fee allowed the Probate Judge to the Department of Game and Fisheries is unconstitutional and void so far as it relates to Montgomery County.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of sometime ago, in which you request my opinion as follows:

"We have just received a letter from the Department of Conservation of Game, Fish and Seafoods, calling our attention to Section 42 of No. 240-S 226 Swift, approved August 12, 1935, notifying us that in the future the 15c per license fee allowed the Probate Judge and paid into the County Treasury, shall be paid to the Game and Fisheries Department.

"Will you please advise us if this is correct and let us have the opinion before November 1, 1935, so that we can have the proper report made?"

It is my opinion that under the Constitutional Amendment of 1915 (General Acts, 1915, p. 211) which amendment placed all county officials of Montgomery County on a salary basis, you are not authorized to transmit this fee to the Department of Conservation of Game, Fish and Seafoods as the Amendment requires you to transmit all fees collected by you to the County Treasury of Montgomery County, from which your salary is paid, and, this being a part of the Constitutional Amendment, a statute providing a different disposition of this fee is unconstitutional, insofar as the same conflicts with the constitutional amendment. The Section I refer to above is Section 1 and reads in part as follows:

"* * * The above named officers shall collect the fees heretofore collected by them and shall cover such fees into the county treasury on the first Monday of each month."

It is true the amendment says "heretofore collected" but I think it is clear the legislative intent was that all fees collected by the Judge of Probate, that is all fees emanating from your office as Probate Judge, must be transmitted to the County Treasury and cannot be diverted by an Act of the Legislature, to a different source.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 10, 1936.

Hon. Ed Pettus, Secretary-Treasurer,
State Licensing Board for General Contractors,
Montgomery, Alabama.

Senate Bill 112, approved Sept. 2, 1935, (General Acts 1935, p. 721) creating State Licensing Board for General Contractors, construed as to meaning of "current year" in Section 7.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of March 5, 1936, in which you request my opinion as follows:

"The State Licensing Board for General Contractors came into existence by bill known as Senate Bill No. 112 passed by the 1935 Legislature and was approved on September 2nd, 1935, and went into effect November 2nd. For your convenience I have attached hereto a copy of said Act. I especially call your attention to Sections 7 and 8. Pursuant to said law the Board was organized as directed by the Act and the Board commenced issuing licenses during the month of November, 1935. I would like for you to officially answer the following question:

"1. What should we consider as our 'current year' within the meaning used in Section 7 of said Act?"

Section 7 of Senate Bill 112 approved Sept. 2, 1935, (General Acts 1935, page 721) provides as follows:

"Section 7. The Secretary-Treasurer shall keep a record of the proceedings of said Board; shall receive and account for all the monies derived from the operation of this Act. Any funds remaining in the hands of the Secretary-Treasurer to the credit of the Board after expenses of the Board for the **current year** have been paid, shall be paid over to the State Treasury to the credit of the general fund of the State, on or before the 15th day of January in each succeeding year. The Board has the right, however, to retain at least ten per cent of the total expense it incurs for a year's operation, to meet any emergency that may arise."

In my opinion, the "current year" within the meaning of Section 7 of the Act in question is that year beginning on November 2nd, 1935 and ending on November 2nd of the year following, 1936.

Your attention is directed to the case of **Clarke v. Lancaster Co.** 96 N. W. 593, 598 (Neb.) where, under a statutory limitation on the power of the County Board to contract for bridge building, to cost a sum not greater than the amount of money on hand in the county bridge fund, derived from a levy of previous years and two-thirds of the levy of the current year, it was held

that the term "current year" did not refer to the current "calendar year," but that it referred to the year from one levy to another.

In **Hinton v. Roane,** 50 So. 798 (La.) the Court cites the above case with approval in holding that the wording "current year" used in a statute exempting from seizure upon execution, apart from the land, corn, provisions and other supplies necessary for running the plantation to which they are attached, for the current year, meant from harvest to harvest and not a calendar year.

Just as the Court said in the Hinton case, that if it were true that the "current year" imports the calendar year, a seizure under such construction would mean, under the detailed facts, that nothing more would have been exempt than what "would have been enough for supper," so to hold that the use of the term "current year" in Section 7, supra, means calendar year, would be to deprive the Board of all but "enough for supper," and thus deprive it of its efficiency. That this could not have been the intent of the Legislature seems irresistible.

In my opinion, it was the intent of the Legislative body, that the "current year" for the Board should begin at a date sixty days from the date the Governor affixed his approval to the enabling Act and extend to a similar date in the following year.

Governed by the above rules, therefore, the "current year" of the Board must be held to be from November 2, 1935 to November 2, 1936.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 10, 1936.

Hon. Watkins C. Johnston,
Chairman, Board of Review,
Macon County,
Tuskegee, Alabama.

Statutes—Local Acts 1935, page 41, not violative of Subsection 29, Section 104 of Constitution; but Section 11 thereof is violative of Section 96, Subsection 24 of Section 104 and Section 281 of the Constitution.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

Receipt is acknowledged of your request for opinion as follows:

"Upon demand of the Macon County Democratic Executive Committee and the citizens of Macon County and the Macon County Board of Revenue, we respectfully request an opinion from your office upon all sections of the following Act.

"Act No. 104-H. 239-Bridges, as it appears on Page 41 of the Local Acts of Alabama 1935."

Your request is laid in very general terms. This office, taking a cue from the courts, undertakes to pass upon the constitutional validity of a statute only when the request is squarely presented and then only as to the objections urged against it.

From the addendum to your request, I assume that the principal questions you have in mind are:

1. Is the Act violative of Subsection 29 of Section 104 of the Constitution?

2. Is the Act violative of Section 96, Subsection 24 of Section 104 or Section 281 of the Constitution?

The first inquiry, as stated above, must be answered in the negative.

Subsection 29 of Section 104 of the Constitution provides:

"The Legislature shall not pass a special, private or local law in any of the following cases:

"(29) Providing for the conduct of elections or designating places of voting, or changing the boundaries of wards, precincts, or districts, except in the event of the organization of new counties, or the changing of the lines of old counties;".

In **Dunn v. Dean,** 196 Ala. 486, a case involving a local statute (Local Acts 1915, page 293) similar to the one now under consideration, the provisions therein for dividing Conecuh County into five districts; for the election of a member of the Board of Revenue for, and by the qualified electors in, each of said districts; for "staggering" the terms of the members to be elected, so that all would not expire at the same time, were assailed as being violative of Subsection 29, supra. In disposing of this contention, the court said:

"It creates a body constituted of members separately chosen by the electorate of separate districts, thus excluding the judge of probate who, under the general law, was the presiding officer of the commissioners' court. This departure from a body the members of which were chosen by the electorate of the whole county, and for terms of four years (Aside from the judge of probate who is chosen for a term of six years), to a body the constituents of which are elected by and from districts only, and for terms so ordered and arranged as to prevent the expiration of the terms of all the members at one time, are radical and, in proportion to the subject, superlative changes from the status fixed by general law to a status not contemplated or provided for by general laws. Our opinion, therefore, is that this act is not offensive to the quoted provisions of section 105 of the Constitution. We are advised of no provision of the Constitution that inhibits the Legislature from creating a county governing body as the result of elections of its members by the electorate of defined districts."

* * * * *

"The local act does not violate subdivision 29 of section 104 of the Constitution. It does not purport to make provision for the 'conduct of elections', or to designate places of voting, or to change the existing boundaries of wards, precincts, or districts. It assigns a member of the board to each of five districts for his election which the act itself originally creates for the purpose of defining the territory in which the electorate may vote for a member of the board resident of that district."

The second inquiry must be answered in the affirmative. The local statute under consideration in Section 11 thereof provides:

"Section 11. That the members of said Board of Revenue, including the Chairman, shall be entitled to Five Dollars per day for each day of actual service rendered in attending the meetings of said Board, or for any work or labor or service rendered in looking after the roads and bridges of the County, to be paid out of the County Treasury on the Certificate or warrant of the Chairman of said Board of Revenue, after the same has been allowed and ordered paid by said Board. Provided, however, the compensation of said Commissioners for any calendar month shall not exceed Seventy-five Dollars each, and that only when engaged in passing upon the assessments of property for taxes. The total compensation for the year to be paid each of said Commissioners not to exceed the sum of Four Hundred Eighty Dollars, or an average of Forty Dollars per month. The compensation of the Chairman of said Board of Revenue shall be fixed at Thirty Dollars per month, such compensation to begin at the expiration of thirty days from the time this Act becomes effective. The word "Compensation", as herein used, to include expenses and the maximum to apply to same."

In my opinion, this provision for the compensation of the members of the Board of Revenue violates the constitutional provisions noted in the said inquiry number 2, supra. See Carnley v. Moore, 218 Ala. 274. Opinion of the Attorney General to Hon. Winston Stewart, Judge of Probate of Coosa County, Rockford, Alabama, under date of January 23, 1936, a copy of which is enclosed herewith.

In arriving at this conclusion, I have considered the so-called Sparks Amendment (Constitution, Article XXIV, Acts 1933, page 46).

Section 11 of the Local Act, being invalid, is inoperative. However, as against any objection to its validity herein considered, it is my opinion that the remaining Sections and provisions of the Act are valid.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 11, 1936.

Hon. Frank N. Julian,
State Fire Marshall, Ex-Officio,
Capitol.

Dear Sir:

I beg to acknowledge receipt of your letter, as follows:

"I beg to call your attention to Chapter 27 of the Code of Alabama of 1923. This Chapter includes Section 951 through 984 inclusive. I also beg to call your attention to an Act of the Legislature (Regular Session, 1935) found on page 3 of the General Acts of the Legislature of Alabama, 1935. Generally speaking, the above constitutes the statutory law of the State of Alabama governing the operation of the Office of the State Fire Marshal.

"Under the law of this state the Department of the State Fire Marshal is maintained and supported by a special tax collected from insurance companies who have business in the State of Alabama. Under the law it is the duty of the State Fire Marshal to suppress arson and to investigate the cause of the origin of fires. It is a matter of common knowledge that the criminal laws of this state against arson are

flagrantly violated, and it is also a well know fact that it is most difficult to apprehend criminals of this type.

"In a certain county in this state it appears that the criminal laws of this state against arson are being most flagrantly violated. The condition is so acute as to amount to an emergency. Now and then, in unusual cases, it becomes necessary for this Department to incur expenses a bit out of the ordinary. These expenses are, of course, legitimate, lawful and necessary expenses. A deputy, for example, now and then requires assistance.

"In other words, in making a thorough investigation, it becomes necessary for a deputy to incur certain lawful and legitimate expenses over and above the per diem and mileage paid to him by the state out of the State Fire Marshal's fund. I have never thought that the incurring of these expenses in unusual cases by the employment of help for a short period of time violated the law. In fact, it has always appeared to me that the duty devolves upon me to incur whatever necessary expenses are required in order that an investigation be thorough and complete. In the county just referred to, because of the unusual conditions and circumstances, in my judgment ,it will be almost impossible for a deputy to complete the investigation alone. My other deputies are very busily engaged in other parts of the state. The situation calls for immediate attention and it will be necessary for this Department to incur some additional expenses in conducting this investigation. I do not feel that I should call off my other deputies and place them on this investigation, because the investigations being conducted by the other deputies are very important and pressing.

"Will you please advise me whether under the conditions set out hereinabove it will be lawful for me, as State Fire Marshal, to incur such lawful, legitimate and necessary expenses as may be required to make the investigation thorough.

"I will appreciate a prompt reply."

I have investigated the law of Alabama governing the operation and maintenance of the Office of the State Fire Marshal, including Section 951 through 984 of the Code of Alabama of 1923 and the Act of the Legislature found on page 3, Regular Session, 1935.

Under the law, it is the duty of the State Fire Marshal of Alabama to enforce the laws and ordinances of this state relating to the prevention of fires, suppression of arson, and the investigation of the cause, origin and circumstances of fires. The State Fire Marshal's Department is maintained solely by a special tax paid by insurance companies doing business in the State of Alabama.

I can't conceive that the Legislature of Alabama has intended to cripple your Department or to handicap its activities in the matter of enforcing the criminal laws of Alabama against the commission of the crime of arson, by not providing sufficiently expense monies to allow your Department to function thoroughly and effectively. If it becomes necessary for one of your deputies, with your approval, to incur lawful, legitimate and necessary expenses in the matter of investigating the origin of fires and in the matter of suppressing arson, it is my judgment that the law vests in you authority to proceed to authorize your deputy to incur such necessary and legitimate expenses. For example, if while acting under your directions, a

deputy finds it is necessary to incur legitimate expenses other than per diem and mileage in order that his investigation may be thorough and in order that the perpetrator of a crime may be brought to justice, it is my judgment that such deputy, with your full knowledge and approval, may incur such expenses. I do not mean to say that this authority vested in you by the law should be exercised carelessly, or that a deputy is authorized to incur any expense that is not absolutely necessary and legitimate. But I do mean this: If in the performance of his duties as deputy it becomes necessary for such deputy to retain the services of some individual whose services are necessary and whose services will greatly facilitate the investigation, then, with your approval, it is my judgment that such deputy may proceed to incur such expenses. Otherwise, I can conceive that your Department would be greatly handicapped in the matter of suppressing arson and preventing fires of incendiary origin.

I know you will exercise the authority given you in the law prudently and carefully.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 12, 1936.

Hon. Bradford Cooper,
County Treasurer,
Marion County,
Hamilton, Alabama.

County Treasurer—County Treasurer held liable for payment of claim against County on duplicate warrant when said claim has been formerly paid by said Treasurer.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of February 5th, 1936 requesting my opinion as follows:

"In case the County Treasurer pays a warrant or witness claim upon a Duplicate issued by the Probate Judge and later finds that upon paying the duplicate he has paid it twice, am I as treasurer wholly responsible for the refund to the County for said witness or warrants paid.

"What should be required for the clerk and Probate Judge to issue a Duplicate on any claim."

In reply, I wish to advise that in my opinion when a claim against the county is once paid, it is no longer a valid claim and the duplicate warrant issued therefor would be null and void on its face.

For answer to your question relative to your responsibility for payment of a duplicate warrant of a claim which has been formerly paid by you, I refer you to an opinion addressed to you on March 23, 1931 with authorities cited therein, reported in the Biennial Report of the Opinions of the Attorney General 1930-32, page 179 which answers your question specifically. I wish to further refer you to an opinion of the Attorney General rendered to Hon.

Charles W. Lee, State Comptroller, under date of March 5, 1936, copy of which is inclosed herewith.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

March 12, 1936.

Hon. G. H. Boyd, Register,
Tenth Judicial Circuit,
Court House,
Birmingham, Alabama.

Where the State is successful in condemning an automobile or other vehicle for transporting whiskey and the property condemned is sold but does not bring a sufficient amount to pay the costs, the balance cannot be paid out of the Law Enforcement Fund, as in cases of this character there can be no decree against the State. Neither does Section 7805, Code of Alabama, 1923, apply.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 25, 1936, in which you request my opinion as follows:

"Section 4784 of the 1923 Code provides for the distribution of funds received from the sale of vehicles caught, condemned and ordered sold by the Court for transporting prohibited liquors.

"Recently I held a sale of an automobile, which had been condemned for violating the law. The car had been badly wrecked and was sold for only $10.00, which was a reasonable price. The total court costs in this case amounted to approximately $22.00. In other words the sale price was insufficient by $12.00 to take care of the actual court costs.

"Please advise me whether or not the difference of $12.00 court costs, as referred to above should be billed to the State and paid from the Law Enforcement Fund as provided in Section 4785 of the 1923 Code, or should the cost incurred by the State be handled in the manner as provided in Section 7805 of the 1923 Code."

Answering your inquiry, I call your attention to Section 4785, Code of Alabama, 1923, which is as follows:

"In all cases filed under this article for the purpose of condemning and selling conveyances and vehicles of transportation of any kind on account of their use in the transportation of prohibited liquors or beverages, if a decree shall be rendered against the state the court costs shall be paid out of the law enforcement fund provided for in this article, said payment to be made on warrant of the auditor, upon the receipt by the auditor of the bill of costs certified as being correct by the register of the circuit court in which such case shall have been tried, which cost bill should also bear the approval of the attorney general and the governor before warrant shall be drawn."

In the case you refer to, the State did not fail or there was no decree against the State, therefore none of the costs can go against the State and be payable out of the law enforcement fund.

Section 7805, Code of Alabama, 1923, does not apply in cases of this character as you cannot issue execution against the State.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 13, 1936.

Hon. Chas. W. Lee,
State Comptroller,
CAPITOL.

Inferior Court, Huntsville—Fees.

1. Solicitor's fee not payable by Convict Department under Section 3667 of the 1923 Code of Alabama, as Solicitor is paid a salary by the State of Alabama.

2. The Sheriff's fees in the Huntsville Inferior Court where the defendent is convicted and sentenced to hard labor for the County are payable under Section 3667 of the Code of Alabama of 1923.

3. The fees which originate in the Huntsville Inferior Court where the defendant is sentenced to hard labor for the County are payable under Section 3667 of the Code of Alabama of 1923.

4. Likewise, witness fees which originate in the Inferior Court of Huntsville where the defendant is convicted and sentenced to hard labor for the County are payable under Section 3667 of the Code of Alabama of 1923.

5. The amendment of Section 23 as shown by Local Acts 1932, page 54 is constitutional.

6. Solicitor's fee is payable to the County.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your letter of December 30, 1935, in which you request my opinion as follows:

"Please refer to Local Acts of 1911, pages 215-221, as amended Local Acts 1923, pages 32-34, Local Acts 1931, pages 19-20 and Local Acts 1932, page 32 and page 54, Sections 3667, 3738, 3741 and 3771, Code of 1923, and the following costs taxed against a defendant on conviction, for which he was sentenced to hard labor.

"Sheriff's fees:

Arrest	$ 2.00
Guard fee	2.00
Serve subpoenas	2.00
Total	$ 6.00

"Inferior Court fees:

Complaint	$ 0.25
Warrant	.50
Issue subpoenas	1.00

Trial	1.00
Continuance	.25
Total	$ 3.00

"Witnesses on Trial:

(name	$ 0.50
"	.50
"	—
"	.50
Total	$ 1.50

"Recapitulation:

Solicitor fee,	$10.00
Sheriff's fees	6.00
Inferior Court fee	3.00
Witness fees	1.50
	$20.50

"and advise me as follows:

"1. Would the Solicitor's fees be payable by the Convict Department under Section 3667 taking into consideration the fact that such Solicitor is paid a salary by the State of Alabama?

"2. Would the Sheriff's fees be payable by the Convict Department under Section 3667?

"3. Would the Inferior Court fees be payable by the Convict Department under Section 3667?

"4. Would the witness fees be payable by the Convict Department under Section 3667?

"5. Is the Amendment of Section 23 as shown by Local Acts of 1932, p. 54, constitutional?

"6. Can such Solicitor's fees as set out in Section 23, as amended, be converted to the County Treasurer by Local Acts taking into consideration the facts that such Solicitor is paid his salary by the State and Section 5511, Code of 1923?"

Answering your first question, it is my opinion that the solicitor's fee should not be paid by the Convict Department. I refer you to a part of Section 3667 of the 1923 Code of Alabama, which is as follows:

"Section 3667. * * * and when the conviction is secured by a solicitor other than a solicitor who is paid a salary by the state, or when the solicitor is paid a salary by the county, such bill of costs shall also include the solicitor's fee which is now or may be allowed by law."

Biennial Report of Attorney General 1920-1922, p. 81.

My answer to your second inquiry is in the affirmative. I call your attention to Act No. 77, S. B. 138, (Local Acts 1931, p. 19) which Act amends the Act of April 11, 1911, which established the Huntsville Inferior Court.

Section 6 of said Act provides as follows:

"Section 6. Said Judge shall have and exercise the same powers and authority that are now by law conferred on Justices of the Peace or may hereafter be conferred on them and shall have power and authority to sentence to hard labor for the county for non-payment of costs any person or persons convicted in said court; he shall have the right to solemnize the rites of matrimony, administer affidavits or oaths, take acknowledgments of deeds, mortgages and other conveyances, and take recognizances."

Although the Act confers on the Inferior Court of Huntsville only the jurisdiction of justice of the peace in criminal and civil cases, it further provides that the judge of this court may sentence to hard labor. In this connection, however, I might call your attention to the fact that Section 3667, supra, as it appears in the Code is only applicable to felony cases; that is, cases sentenced to the penitentiary, but is made applicable to hard labor cases by Section 3 of an Act approved February 18, 1927, (General Acts, 1927, p. 52).

My answer to your third inquiry is in the affirmative for the reasons set out in my answer to your second inquiry.

My answer to your fourth inquiry is in the affirmative for the reasons set out in my answer to your third inquiry.

My answer to your fifth inquiry is in the affirmative. The only section of the Constitution of 1901 on which this Local Act could in anywise infringe, is Section 96 which is as follows:

"The Legislature shall not enact any law not applicable to all the counties in the state, regulating costs and charges of courts, or fees, commissions, or allowance of public officers."

I do not think the Local Acts of October 25, 1932 (Local Acts 1932, p. 54) could be said to conflict in any way with this section of the Constitution. The Local Act in no wise changes the fees or charges of solicitors but simply changes the mode of distribution. I am aware that Section 5511, Code of Alabama, 1923, says:

"All fees which may be by law taxed as solicitors' fees against defendants on convictions secured by solicitor who is paid a salary by the state belong to the state, and, when collected, must be paid into the state treasury."

But this is just a statutory enactment and is subject to changes. Of course, if Section 5511 were a constitutional provision, it would fix the matter and would have to be followed; but being statutory, it is subject to changes or abrogation by the Legislature as was done by the Act we have under consideration. I call your attention to the case of Roden v. Griffin, 179 Ala. 633. This is an appeal from Cullman County and involves a Local Act very similar to the one here being considered. See also **Biennial** Report of Attorney General 1918-1920, pp. 281, 567, 653 and 677.

My answer to your sixth inquiry is in the affirmative for the reasons set out above.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 13, 1936.

Hon. James E. Jones,
County Solicitor,
Conecuh County,
Evergreen, Alabama.

Solicitor's fees—Violation of Fish and Game Laws—

1. Under an Act of the Legislature approved September 9, 1935, Senate Bill 226, Swift, the solicitor or deputy solicitor of any county is required to appear and prosecute any violation of the provisions of the game and fish laws or the rules and regulations provided thereunder.

2. Where a conviction is obtained, a solicitor's fee of $5.00 is imposed.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of October 23rd, in which you request my opinion as follows:

"I am writing you for an opinion of an Act passed at the last session of the Legislature, Section 51 of an Act approved on August 12th, 1935, (No. 240-S. 226 Swift) in regard to the game and fish laws of the State of Alabama.

"This law provides for a Solicitor's fee of $5.00 but there is some doubt as to whether it is to be paid in all cases or just in cases where the Solicitor prosecutes the case. What I wish an opinion on is whether or not the fee of $5.00 is payable in all cases whether there is a conviction by trial or a plea of guilty.

"Please let me have your opinion at your earliest convenience as we are holding up some cases here until we get same."

In reply I call to your attention Section 51 of the Act to which you refer, which provides:

"Section 51. The solicitor of any county, or deputy solicitor of any county, in which any violation of the provisions of the game and fish laws or the rules and regulations provided thereunder shall have occurred, shall appear on behalf of the State and prosecute the offender. When a conviction has been obtained and a fine or penalty imposed in the court of a justice of the peace or a court of similar jurisdiction, there shall be attached, in addition to the other costs, a fee of five ($5.00) dollars as solicitor's fee."

As you will note, the solicitor is required to appear and prosecute. This is a mandatory requirement. He being charged with this duty, it is my opinion that the solicitor's fee attaches in all cases of convictions, whether by trial or by plea of guilty.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 13, 1936.

Hon. James A. McCollum,
Deputy Solicitor,
Tuscaloosa County,
Tuscaloosa, Alabama.

Inferior Court of Tuscaloosa County.

1. Solicitor's fee should not be collected in the Inferior Court of Tuscaloosa County in criminal cases of which the justices of the peace now have jurisdiction with the exception of cases for violations of the provisions of the Game and Fish Laws.

2. Trial tax in all criminal cases in the Inferior Court of Tuscaloosa County shall be $3.00.

3. Judge of the Inferior Court of Tuscaloosa County does not have authority to grant a new trial.

4. Solicitor's fee of $5.00 for conviction for violation of the Game and Fish Laws should be paid into County Treasury of Tuscaloosa County.

5. Justices of the Peace have final jurisdiction for violations of Act No. 331, H. B. 545, approved September 2, 1935 (General Acts 1935, p. 756).

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your letter of January 23, 1936, which reads as follows:

"I have been requested to get your official opinion on the several propositions presented below.

"The Local Acts of Alabama for 1927, at Page 131, seem to indicate that no Solicitor's fee should be collected in the Inferior Court of Tuscaloosa County, Alabama, in any 'criminal cases of which the Justices of the Peace now have jurisdiction,' unless it would be in cases of violations of the Fish and Game Laws, which now provide for a $5.00 Solicitor's fee in Justice of the Peace Courts, since no provision is made for the collection of any Solicitor's fee in such cases, and a specific provision is made for the collection of a Solicitor's fee in 'all other criminal cases,' thus indicating that the Legislature did not intend for any Solicitor's fee to be collected in criminal cases in the Inferior Court, of which Justices of the Peace have jurisdiction, but as the law does not specifically state that a Solicitor's fee should not be collected in said cases, I would like to have your opinion as to whether a Solicitor's fee should be collected in the Inferior Court of Tuscaloosa County, Alabama, in any criminal cases of which Justices of the Peace have jurisdiction.

"I would like to know whether the amount of the trial tax collected in all criminal cases in the Inferior Court of Tuscaloosa County, Alabama, should be $3.00 or $5.00.

"I would also like to know whether or not the Judge of the said Inferior Court has authority to entertain a motion for, and power to

grant, a new trial, and if so, how long a defendant has in which to file his motion for a new trial.

"Several Justices of the Peace have asked me to get a ruling from you on Section 51 of the Fish and Game Laws of Alabama, approved August 12th, 1935, with reference to the Solicitor's fee of $5.00 that should be attached in all cases of convictions for all violations of the Fish and Game Laws in the Courts of the Justice of the Peace, or a Court of similar jurisdiction.

"It would seem that it was the intention of the Legislature to encourage the enforcement of the Fish and Game Laws by giving the County or Deputy Solicitor a $5.00 fee for each conviction for a violation of said law, in addition to any or all other salary or fees, to pay his expenses for travelling all over the County to prosecute cases in thirty or forty Justice of the Peace Courts, which in large counties, where several hundred cases are tried some years, would be a considerable burden, both in regard to duties and expenses to the Deputy Solicitor; and the Justices of the Peace want to know whether the $5.00 Solicitor's fee should be paid to the Deputy Solicitor of Tuscaloosa County, whose salary is fixed by the Local Acts of 1927, which provide that said salary 'shall be in lieu of any other salary now provided to be paid him,' or whether it should be retained by them as a part of their fine and forfeiture fund, to reimburse them for the loss of their fees in State fail cases for violations of the Fish & Game Laws and other laws, or whether it should be paid direct to the County Treasury without being paid to the Deputy Solicitor or without deducting the fees allowed Justices of the Peace in State fail cases, in view of the fact that all officers are paid on a fee basis only for service in Justice of the Peace Courts.

"Do Justice of the Peace Courts have final jurisdiction of any violation of the highway laws of Alabama, and if so, which ones?"

Answering your first question, it is my opinion that no solicitor's fee should be collected in the Inferior Court of Tuscaloosa County in criminal cases of which justices of peace now have jurisdiction, with the exception of cases for violations of the provisions of the Game and Fish Laws.

I call your attention to a part of Section 4 of Act No. 228, H. B. 707, approved August 3, 1927 (Local Acts 1927, p. 130) being the Act which created the Inferior Court of Tuscaloosa County, and Section 51 of Act No. 240, S. B. 226, approved August 12, 1935 (General Acts, 1935, p. 632) which are as follows:

"Section 4.*** It shall be the duty of said Clerk to tax and collect in each civil case in said Inferior Court the same costs and fees for services of the Clerk and Sheriff and witnesses in civil cases in said Court as are now allowed by law to be assessed, charged and collected for same in the Justice of Peace Courts, and the same costs, fines and fees in criminal cases as are now allowed by law to be assessed, charged and collected in the Justice of the Peace Courts, in all criminal cases of which the Justices of the Peace now have jurisdiction.***"

"Section 51. The solicitor of any county, or deputy solicitor of any county, in which any violation of the provisions of the game and fish

laws or the rules and regulations provided thereunder, shall have occurred, shall appear on behalf of the State and prosecute the offender. When a conviction has been obtained and a fine or penalty imposed in the court of a justice of the peace or a court of similar jurisdiction, there shall be attached, in addition to other costs, a fee of five ($5.00) dollars as solicitor's fee."

Answering your second question, it is my opinion that the trial tax in all criminal cases should be $3.00, as the amount of this tax is expressly provided for in the Act creating the Court.

Answering your third question, it is my opinion that the Judge of the Inferior Court does not have the right or authority to grant a new trial in said Court. The Judge only has such authority as is given him in the Act creating the court and I have been unable to find any provision in said Act which authorizes the Judge to grant a new trial.

Answering your fourth question, it is my opinion that the solicitor's fee of $5.00 for convictions of violations of the Game and Fish Laws in the Justice of Peace Courts or Courts of like jurisdiction in Tuscaloosa County, should be paid into the County Treasury of Tuscaloosa County.

I call your attention to Section 11 of Act No. 228, H. B. 707, approved August 3, 1927, (Local Acts 1927, p. 130)

"Section Eleven. Be it further enacted that said Deputy Solicitor shall receive a salary of $1800.00 per annum payable monthly out of the County Treasury upon his warrant drawn upon the County Treasury, or County Depository, and this shall be in lieu of any other salary now provided to be paid him."

In my opinion the $5.00 solicitor's fee should be paid into the County Treasury as provided by Section 5512 of the 1923 Code of Alabama, which is as follows:

"5512. Solicitor's fees in county courts; how taxed and collected.--For every conviction of a misdemeanor in the County Courts or Inferior courts there shall be taxed and collected as a part of the costs and paid into the county treasury the same solicitor's fees provided for convictions in such cases in the circuit court; and said fee shall be placed in the solicitor's fund of such county by the treasurer of said county; and on appeal to the circuit court, the same shall be taxed as a part of the costs in addition to the solicitor's fee taxed for such conviction in the circuit court, and this solicitor's fee previously taxed in the county court or inferior court, shall be paid, when collected, into the county treasury, and placed in the solicitor's fund of such county by the treasurer of said county."

Answering your fifth question, I call your attention to Section 10 (a) of Act No. 331, H. B. 545, approved September 2, 1935 (General Acts 1935, p. 756) which is as follows:

"Section 10. (a) Any person of whom a driver's license is required, who operates a motor vehicle on a public highway in this State without first obtaining such license shall be guilty of a misdemeanor, and, upon conviction thereof before a Justice of Peace Court or Court of like jurisdiction, shall be punished by a fine of not less than $10.00."

For your information I enclose copies of opinions of this office to Hon. Festus M. Shamblin, Sheriff, Tuscaloosa County, June 13, 1935, and to Hon. Chas. W. Lee, State Comptroller, July 3, 1935.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 17, 1936.

Hon. J. F. Laseter,
Judge of Probate,
Barbour County,
Clayton, Alabama.

Probate Judges-

Under Section 370-A of the 1935 Revenue Act $6000 per annum net is the maximum amount which probate judges can receive, which maximum includes any ex-officio salary as Judge of the County Court.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I received your letter in which you asked if the ex-officio fees as Judge of the County Court should be paid the Probate Judge in excess of the $6000 maximum provided by Section 37—A of the Revenue Act of 1935, or if such maximum included all compensation by virtue of such office.

It appears that this is answered by the opening paragraph of Section 370—A, which provides:

" The fees, compensations and earnings of the Judges of Probate allowed under the Revenue Laws of the State shall not, **together with all other fees, compensations, allowances and earnings due them**, exceed $6000 net per annum.***"

As the Judge of Probate is ex officio Judge of the County Court, it seems that clearly the salary paid him for such ex officio services comes within the term "all other fees, compensations, allowances and earnings." It is, therefore, my opinion that $6000 is the maximum that can be paid.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 18, 1936.

Dr. A. H. Collins,
Commissioner, Department of Public Welfare,
Montgomery, Alabama.

Public Welfare Department - Confederate Pensioners -

1. Confederate Veterans required to comply with all requirements of Senate Bill 397, Simpson, (Acts, 1935 p. 967) for eligiblity for old age assistance.

2. No set procedure is required for making investigation of Confederate Pensioner's eligibility requirements for old age assistance when Confederate Pensioner fails to make application.

3. Application filed by State Department of Public Welfare for Confederate Pensioner Veteran must be heard and passed upon as if filed by such person himself.

4. No definite time limit set within which applications shall be made for Confederate Veterans by the State Department of Public Welfare.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of March 6, 1936 requesting my opinion as follows:

"We would appreciate having your opinion on the following questions regarding Section 17 of SB-397-Simpson, approved September 14, 1935. (Acts 1935 p. 967)

"1. Under what circumstances would a Confederate Veteran 'also be entitled to an old age pension under the terms of this Act' (SB-397-Simpson, approved September 14, 1935)?

"2. In cases where the Confederate Pensioner fails to file application for Old Age Assistance, how is the State Department of Public Welfare to ascertain for which pensioner to "make application on his behalf in the county in which he resides" without a complete investigation of the Confederate Pensioner's income, residence, legally responsible relatives, etc.?

"3. After such an investigation, as referred to in Question No. 2 has been made, and the Confederate Pensioner found to be eligible also for Old Age Assistance, and the State Department of Public Welfare has made application for Old Age Assistance on his behalf, why should the Application 'be heard and passed upon as if filed by such person himself' (SB-397 - Simpson, approved September 14, 1935) since our investigation has already been made to determine if the Confederate Pensioner is eligible also for Old Age Assistance?

"4. Does SB-397 - Simpson, approved September 14, 1935, imply any definite time limit to the State Department's making application for Old Age Assistance on behalf of Confederate Pensioners since the law says: 'if any person shall fail to make such application on or before March 1, 1936, the State Department shall as soon as practicable thereafter make application, etc.'?"

In reply to your request, I wish to advise that, in my opinion, your first question is answered by Section 3 of Senate Bill 397 - Simpson, referred to in your request, which section sets out the requirements for old age pensions generally. I find no provisions in the above named Act exempting Confederate Veterans from the requirements set out in said Section 3 of said Act.

In reply to your second question, I wish to advise that SB-397-Simpson, supra, makes no provision for procedure in determining which of the Con-

federate Veterans now receiving a Confederate Pension may be eligible to also receive old age assistance under the terms of this law. In my judgment, the matter of procedure in making the proper investigations of the Confederate Pensioners status in order to qualify him under the terms of the above named Senate Bill 397-Simpson is left to the discretion of the State Department of Public Welfare. I might add that I know of no better method to meet the demands of Section 3 of said Senate Bill 397-Simpson, than the method suggested in your inquiry of making a complete investigation of the Confederate Pensioner's qualifications in the county in which he resides.

In reply to your third inquiry, I wish to advise that SB-397-Simpson, contains a clear mandate that the application here referred to "be heard and passed upon as if filed by such person himself." Your question involves a question of reasons for legislation rather than legislative intent in the premises, and this office is not in position to offer reasons that promote legislation. Since the above named Act commands that such hearing be had, however, it is apparent that the Legislature intended that the involuntary applicant for old age assistance should be given an opportunity to show cause why his name should not be enrolled on the old age pension list.

In reply to your fourth inquiry, I wish to advise that in my judgment no definite time limit is set within which the State Department of Public Welfare shall make applications for old age assistance on behalf of Confederate Pensioners, who, for any reason fails to make said application. Section 17 of Senate Bill 397-Simpson, supra, provides that such application be made on behalf of the Confederate Veteran or widow of said Confederate Veteran as soon after March 1, 1936 as practicable, in the county wherein he resides. The word "practicable" has been judicially defined as follows: Words and Phrases 4th Series, Vol. 3, page 134:

> "The usual meaning of the word 'practicable' is: 'That may be practiced or performed; capable of being put into practice, done or accomplished; feasible; as a practicable method;***' "

It is my opinion that the legislative intent here is that the applications here referred to shall be filed as rapidly as the circumstances governing the situations will permit. This to be determined by the Department of Public Welfare.

I wish to refer you to opinions addressed to you under date of February 10, 1936 and February 12, 1936.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 18, 1936.

Hon. P. C. Black,
Judge of Probate,
Geneva, Alabama.

Licenses--Medicine Vendors.

1. Under the facts set out, person held not liable for license levy by Schedule 104 of the Revenue Act of 1935.

2. Liability under Schedule 147 held dependent on the manner in which such business is conducted.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of November 22nd, in which you state:

"I have a request for opinion with reference to license on the sale of medicine under the following circumstances:

"1. The medicine sold is prepared and mixed, or manufactured by a registered pharmacist, is labeled as provided by law.

"2. The manufacturer of this medicine goes from one town to another on regular days and makes his headquarters at some store or office and while there sells this medicine to purchasers who come to the place to buy.

"3. The manufacturer does not offer the medicine for sale from house to house or person to person.

"Is the manufacturer or dealer in this kind of medicine due a State and County License? If so, under what schedule does it come and what license would he be due?

"Is the man who offers the medicine for sale under the circumstances above, due a license? If so, under what schedule would he be licensed and what amount of license would he be due?

"In other words, certain ingredients are furnished a pharmacist and this pharmacist mixes or manufactures a medicine from the ingredients furnished him, and the pharmacist bottles and labels the medicine in the manner provided by law. The person who furnishes the ingredients then takes the bottles of medicine and offers the same for sale at various places within the county, the time and place being announced ahead of time. There are two licenses I desire to inquire about: The license required of the pharmacist, who manufactures or mixes the ingredients, who also bottles and labels the medicine, and also the man who sells the medicine in the manner indicated above."

From your statement, this person does not go from person to person or place to place, and therefore, in my judgment, is not an itinerant vendor or peddler of medicine from whom a license is required by Schedule 104 of the 1935 Revenue Act. You do not state whether your party gives exhibitions, shows, performances or other entertainments in connection with the selling of his products. If this is true, he would be liable for license under Schedule 146.

The foregoing answers your question with reference to licenses proper. Whether such party is complying with the Alabama Law regulating Pharmacists, is a matter which should be taken up with Mr. Sam A. Williams, Secretary of the Alabama Pharmaceutical Association.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 18, 1936.

Hon. Haygood Paterson,
Sheriff, Montgomery County,
Montgomery, Alabama.

Court costs-costs in divorce case not subject to claim of exemptions.

Opinion by Assistant Attorney General Knabe.

Dear Sir:

I am in receipt of your letter of February 28, 1936, which is as follows:

"I, Haygood Paterson, as Sheriff of Montgomery County, Alabama, have levied upon one Oldsmobile automobile as the property of Earl S. O'Neal, pursuant to an execution issued out of the Circuit Court of Montgomery County, Alabama, in Equity, in the case of George H. Jones, Jr., Register vs. Earl S. O'Neal wherein Mr. Jones as Register is attempting to collect $72.70 as Court Costs in the case of O'Neal vs O'Neal wherein Mrs. O'Neal was granted a divorce against Earl S. O'Neal which divorce was granted on the grounds of cruelty. The decree of said divorce granted certain sums for maintenance and support of the children, but this execution is for the Court Costs accruing on the main case which costs were taxed in the decree against the Defendant. Earls S. O'Neal has filed his certificate of exemption which said certificate is in words and figures as follows:

STATE OF ALABAMA
MONTGOMERY COUNTY

CERTIFICATE OF EXEMPTION

Before me, A. J. Harris, Jr., a Notary Public, in and for said State and County, personally appeared Earl S. O'Neal, who being known to me and being by me first duly sworn, on oath, deposes and says that:

He is a resident of Montgomery County, State of Alabama, and that he hereby makes known and declares that he has selected and claimed as exempted to him under the Constitution and laws of the State of Alabama, the following described personal property:

1. Wearing Apparel
2. An Oldsmobile automobile not exceeding in value $750.00, allowed under section 7886 of the Code of Alabama.
3. Wages, exemption allowed under sections 7887 and 7886 of the Code of Alabama.

E. S. O'NEAL,

"Sworn to and subscribed before me this the 21st day of February, 1936. A. J. HARRIS, JR.

"The Register in Chancery has filed exceptions to the exemptions and the matter is in abeyence by agreement pending a ruling from you. The specific question I would like for you to answer is: Can the Respondent, O'Neal, claim his exemptions as against said execution for costs and whether or not I, as Sheriff, should release said levy or conclude the same by selling said property according to law?"

I am of the opinion that the respondent cannot claim exemptions against execution for costs in this case and that the property should therefore be disposed of according to law.

Exemptions are allowed from "debts contracted" (Section 204, Constitution and Section 7887 of the Code) or from "debts" (Section 7886 of the Code 1923. These two terms have been held to be synonymous. Crabtree v. Kirby, 225 Ala. 20, 142 So. 32.

A divorce action is not founded on a contract but is an action in reference to the violation of a duty imposed, or a right granted, by law. It has been held to be quasi criminal (Stafford vs. Stafford, 41 Tex. 111), and of the character of criminal proceedings (Barber vs. Root, 10 Mass. 260; Matchin v. Matchin, 6. Pa. 332). There seems to be no basis on which respondent may claim exemptions on the theory that costs in a divorce case are contractual and therefore "debts" within the contemplation of our statutes and constitution.

Our court has repeatedly held that alimony and attorneys' fees in divorce cases are not subject to exemption. Judge Sayre in the case of Ford vs. Ford, 201 Ala. 519, 78 So. 873, stated:

> "Appellant in response to a levy upon his land set up a claim of homestead exemption. The decree for alimony and attorney's fee was not a 'debt contracted' within the meaning of the Constitution and statute enacted in pursuance thereof . . . the claim of exemption cannot be maintained."

In Littleton v. Littleton, 224 Ala. 103, 139 So. 335, the court held similarly in reference to personal property. Said the court:

> "(5) The decree for alimony and attorneys' fee was not a "debt contracted" within the meaning of our Constitution and statutes, and defendant's claim of exemption as to the garnished sum was properly disallowed."

Costs partake of the nature of the suit. As summarized in the case of Morscheimer vs. Wood, 78 So. 200, the court stated;

> "It has been definitely determined that costs partake of the nature of the suit * * *."

Since the judgment in this case is not subject to exemptions, court costs would not be subject to exemption. Further, as attorney's are not subject to claim of exemptions, even more so would court costs not be subject to claim of exemption.

While this particular type case has apparently not been decided by our courts, the attitude of the Alabama Supreme Court is indicated in the case of Crabtree vs. Kirby (1932) Supra, where the court held that court costs in a statutory suit in equity to fix and declare a disputed boundary line were not subject to a claim of homestead exemption.

See also Jones v. Tarleton, 16 Ala. App. 95; 78 So. 643, relating solely to to costs.

I am therefore of the opinion that in the instant case, the respondent is not entitled to claim exemptions and his property should be sold in accordance with the provisions of the law.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 18, 1936.

Hon. Jno. B. Sockwell,
Solicitor, Colbert County,
Tuscumbia, Alabama.

County is without authority to pay for printed city directory for the use of sheriff.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of March 4, 1936, in which you request my opinion as follows:

"Some time ago a city directory was printed of the Tri-Cities and it is very helpful to our office, and will you please advise if the County Commissioners can pay for this bill."

I find no authority of law for the county to pay for a city directory for your office. Before the county commissioners or board of revenue can pay for equipment of any character for offices or officers, it must be able to point to some direct statute or construction of a statute authorizing the same. 117 Alabama 203, 70 Ala. 145. **Biennial Report of Attorney General, 1926-1928, pp. 127 and 492.**

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 18, 1936.

Hon. A. D. Sherrill,
Tax Collector, Colbert County
Tuscumbia, Alabama.

Taxation—Partial Payments—

Where a corporation assesses to itself a large parcel of property, it cannot later pay taxes on separate lots which are claimed to have been sold under contract to third parties but whose ownership does not appear of record unless such partial payment is equivalent to one-fourth of the total amount of taxes due on October 1st.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of February 13th in which you state:

"The Muscle Shoals Land Corporation contends they can pay partial payment on one lot or a number of lots, I contend they can not under the way their property is assessed, and the way they are trying to pay.

"The real estate value $48,585.00, Personal $103,509.00 ($101,359.00 of the Personal represents Corporation Tax). The Muscle Shoals Land Corporation brought a list of about 100 names requesting of me to write a receipt for each name describing one Lot to each name. Taxes on said each Lot amount to $1.58. Each transaction being a partial payment of their own taxes.

"They also stated neither of the parties had a Warranty Deed to the lots, but owned an equity in the lot, and are sold to them by contract.

"Mr. Anderson has shown me letters he had written you asking for a ruling on certain section of the 1935 Act, but will you give me the rulings of any or all the sections of the 1935 Revenue Act, protecting the tax collector, collecting such taxes assessed as above stated."

I also have letter from the Muscle Shoals Land Corporation with reference to the same matter in which, in substance, it is contended that certain lots have been sold to certain parties but to whom no deeds have ever been executed. It appears that the purchasers of the parties who hold the equities are not themselves making the payments to you, but that the Muscle Shoals Land Company is attempting to pay on certain lots in which they state certain persons have equities. So far as either your letter or their letter discloses, none of the purchasers have any record evidence of their title. It would seem, therefore, that legally the Muscle Shoals Land Company is attempting to make a partial payment of taxes under the provision of 169 rather than 169-A on the theory that they can pay on property the legal title to which is in the Corporation and which was assessed by the Corporation but which it is asserted has been contracted to be sold to various other parties. It is my judgment that this is nothing more nor less than an attempt by the taxpayer to pay on separately assessed parcels owned by him. In order to do this, it would be necessary to meet the requirement of Section 12. See opinion Charles W. Lee, Quarterly Report, Attorney General, page 8.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 18, 1936.

Hon. J. A. Keller, Superintendent,
State Department of Education,
Capitol.

School officials may pay salaries of teachers employed to teach children in convalescent homes provided by the State, regardless of residence of the pupil.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of January 29, 1936 in which you request my opinion as follows:

"Inquiries have come to me from the school officials of Birmingham and Jefferson County asking whether they may pay the salary of a teacher or teachers, assigned to teach children of school age in the convales-

cent home of the Crippled Children's Clinic located in the city of Birmingham.

"For your information, permit me to say that under Federal Social Security Act public funds are provided from federal and state sources under a cooperative plan for aiding in hospitalization and convalescent care of crippled children. At Birmingham and Mobile convalescent homes are being provided and in these homes there will be a large number of children who will be recuperating after having undergone operations. Many of these children will be confined to these homes for several months, and some for a period of twelve months. Convalescent homes offer a splendid opportunity for providing school instruction for these children during their stay therein, thus enabling them to keep up with their studies while away from home.

"While a large number of the children in the convalescent homes will be from the cities and counties in which the convalescent homes are located, some children will be placed in these homes from other counties and cities in the state. It is highly important that educational opportunities be given them.

"In view of these facts, the question is whether funds can be used for the purpose named, since some of the children will be from counties not under the jurisdiction of the administrative unit in which the home is located. Of course, it is understood that the instruction will be under the direction of the county or city boards of education in which the convalescent home is located, and that the pupils will be instructed by properly certified teachers."

In my opinion, the salary of such teachers as may be assigned to teach the children of school age convalescing in the homes provided for that purpose may be properly paid by the school officials regardless of the residence of said children. Section 86 of the Alabama School Code of 1927 places the general administration and supervision of the public schools of the educational interests of each county, **with the exception of cities having a city board of education,** in the County Board of Education.

Section 97 of the Alabama School Code of 1927 provides that the educational policy of the county may be determined by the County Board of Education "with and on the advice of the County Superintendent of Education."

Section 117 authorizes the County Board of Education, upon the written recommendation of the County Superintendent to appoint all principals, teachers, etc.

Sections 206, 207 and 229, respectively, grant power to the City Board of Education, through the City Superintendent of Schools, to exercise control and supervision over the public schools of the city, to determine the educational policy of such city and to appoint principals, teachers, etc. for such educational institutions as may be required.

Section 203 provides for the attendance of City Schools by children without the city as follows:

"Attendance of City Schools By Children Without The City.—City and County Boards of Education shall have authority to reach agreements whereby children in the City may attend the schools in the

County, and whereby the children in the County may attend the schools in the City, and they shall do so when the school in the City or in the County, as the case may be, is nearer to such pupils. In the event the said Boards do not reach agreements for such attendance, the matter shall be referred by either Board to the State Superintendent of Education who shall, after investigation, issue an order relative to same which shall be binding on both Boards. **Other non-resident pupils may be admitted on such terms as the Board of Education of the City may prescribe."**

See Board of Education of Jefferson County et al v. State ex rel Kutchins et al 222 Ala. 70, 131 So. 239.

From the foregoing sections, it may readily be seen that the County Board of Education, or the City Board of Education, as the case may be, has full authority to employ such teachers as may be necessary for the instruction of convalescent children who are **residents** of such county or city.

Granting, therefore, the authority to employ teachers for convalescent homes, the inmates of which are all residents of the county, we are confronted with the more difficult question as to whether the school officials may use the funds provided where some of the children are from counties "not under the jurisdiction of the administrative unit in which the home is located." It is to be noted that Section 203, supra, provides in part as follows:

"Other non-resident pupils may be admitted on such terms as the Board of Education of the City may prescribe."

The Supreme Court of Alabama, dealing with Section 203, has stated that:

"A field of operation, if such there be, and construction should be given this enactment that it will not be rendered repugnant to organic law."

Board of Education of Jefferson County v. State, 222 Ala. 70, 73, 131 So. 239.

It does not necessitate a tortured construction of the provision above cited to warrant the conclusion that the words "other non-resident" may include non-residents of the county, as well as of the city. Indeed, such a construction is necessary in order to give the section that "field of operation" which the Supreme Court has held necessary.

Accordingly, the school officials may pay the salary of the teachers employed to teach the children recuperating in the convalescent homes, as stated in your letter, regardless of the residence of such children.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 18, 1936.

Hon. H. M. Hughes,
Clerk of Circuit Court,
Madison County,
Huntsville, Alabama.

The Circuit Clerk of Madison County is not under the law entitled to pay for issuing affidavit in a criminal case under an Act approved February 11, 1919 (Local Acts, 1919, page 17).

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 28, 1936, in which you request my opinion as follows:

> "The records in this office show that the Clerks of the Circuit Court have been for years charging twenty five cents for issuing affidavits and fifty cents for the warrants in such cases and some have been collected when the defendant paid costs to the clerk.
>
> "Please render me an opinion whether or not the affidavit is a proper charge against the defendant and oblige."

Under a Local Act, 1919, page 17 approved February 11, 1919, (I find no subsequent amendments) you are as clerk of the circuit court authorized to issue affidavits and warrants in misdemeanor cases returnable to the circuit court. The Act is silent as to the compensation you are to receive for this service. So we are compelled to look to the general law on fees of the circuit clerk in the criminal cases. I call your attention to Section 3739 Code of Alabama, 1923, as amended by an Act approved June 18, 1931 (General Acts 1931, page 331) which is as follows:

> "Section 1. That section 3739 of the Code of Alabama of 1923 be and the same is hereby amended so as to read as follows: 3739. (6635) (4562) (4869) (5041) (4337) (4337) FEES OF CIRCUIT COURT CLERKS. Clerks of the Circuit Courts are entitled to the following fees in criminal cases--that is to say: For docketing each cause, to be charged but once--$.10 For issue of any writ, scire facias, or notice--$.50 each subpoena issued --.25 Each continuance--.25 Entering recognizance--.50 For each trial--.50 Entering judgment against each defendant— .25 Entering sentence against each defendant --.25 Issue of each execution --.50 Each entry of the discharge of bail on surrender of the principal, to be paid by the bail --.50 Entering order of removal of trial, and the incidents of such removal --1.00 Making transcript and certificate, for each hundred words --.15 Entry of forfeiture against defendant --.50 Final judgment of forfeiture against defendant --.50 Entry of forfeiture against witness or juror, each --.25 Final record, for each one hundred words --.15 Record for Supreme Court, for each one hundred words --.15 Record for Court Appeals, for each hundred words --.15 Certifying same --.25 For recording indictments and making certified copies thereof, under Sections 4549 (7154) and 4553 (7158), to be taxed as a part of the costs in the case --.25."

The above section as it appears in the Act of 1931, supra, refers to fees of circuit clerks in criminal cases -- note the word **criminal.** The making of the affidavit with issuance of the warrant is the institution of a criminal prosecution and is therefore bound by the provisions in the Act and in the section referred to above, I fail to find any provision for paying for the making of the affidavit but I do find a provision that will govern the warrants. This provision is as follows:

> "***For issuance of any writ, scire facias, or notice—.50

All law of cost is deemed penal in its nature and is governed by Section 3734, Code of Alabama, 1923, which is as follows:

"No fee charged unless expressly authorized-- The law of costs must be deemed and held a penal law, and no fee must be taken but in cases expressly provided by law. The fees prescribed in this Code shall be the only fees that can be collected by any officer."

42 Ala. 514; 16 Ala. 773; 55 Ala. 133.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 18, 1936.

Hon. C. E. Carmicheal,
County Solicitor, Colbert County,
Tuscumbia, Alabama.

Veteran's Exemption Act. - Words "honorable discharge" held to include discharge because of fact of disability as contradistinguished from discharge for insubordination or other like cause.

Opinion by Assistant Attorney General Small.

Dear sir:

I have your letter of recent date requesting my opinion as follows:

"Would John Doe a veteran of the World War, who served eight months in the Service of the U. S., and was discharged therefrom because of a physical disability, and who has been declared to have twenty-five per cent or more disability but whose discharge does not recite in so many words that it is a so-called "Honorable Discharge", be eligible for the veterans exemption provided by the 1935 veterans exemption, Acts of 1935, page 1057, when applying for a license.

"John Doe meets all requirements of the 1935 Act other than possessing a discharge labeled "Honorable Discharge".

In reply, I wish to advise that the Veterans' Exemption Act found on page 1057 of the Acts of 1935 provides, among other things, that the veteran "upon the production of an honorable discharge from the service of the United States Army, Navy or Marine Corps during the World War—" shall be eligible for the license exemption herein provided for.

Considering the language of the statute applicable to your request; namely, "the production of an honorable discharge", it is my opinion that the words "Honorable Discharge" as used in the Act, supra, contemplate among other reasons for discharge, a discharge because of physical disability.

As I understand these terms, an honorable discharge because of physical disability from the service is considered an honorable discharge as distinguished from a discharge for insubordination, misconduct, or similar cause.

It is therefore my opinion under the facts stated in your request that this veteran will be eligible for veteran's license exemption provided for by the 1935 Act, supra.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 18, 1936

Hon. A. H. Howard,
Tax Collector, Macon County,
Tuskegee, Alabama.

Sale of land for taxes.

1. Tax Collector required to file his docket of delinquents with the Probate Judge on or before the first day of March.

2. Probate Judge must issue a notice to delinquents as speedily as possible, which notice must be served by the Tax Collector by one of the methods provided by Section 217 of the General Revenue Act of 1935.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of March 4th in which you state:

"There seems to be quite a variance in the interpretation of citation period for 1935 taxes which are delinquent. So as to make it clear to the people of Macon County, won't you please give me a ruling as to whether citations are to be served now, or April 1, as tax payers here seem to believe."

In reply I advise that I do not see how I can make the matter any clearer than do the statutes. I call your attention to the following:

Section 214 of the Revenue Act of 1935, empowers the Probate Court to order the sale of lands for delinquent taxes.

Section 215 provides for the Tax Collector to file his docket of delinquents with the Probate Judge.

Section 216 gives further details of such docket and provides:

"Such book shall be delivered to the Judge of Probate on or before the first day of March, but if from any cause there has been a failure to deliver the same by that time, it may be delivered thereafter."

I do not interpret this as a blanket extension of the time which the Tax Collector is required to deliver the book to the Probate Judge. It commands him to deliver it on or before the first day of March, but merely provides that his failure to do so by that time shall not be fatal.

Section 217 provides substantially as follows: That "on receiving such book and as speedily as practicable the Judge of Probate shall issue a notice addressed to each person against whom any unpaid taxes are assessed, as shown by such book." Then follows the form of the notice and the provision for service.

"As speedily as practicable," would indicate that immediately upon receiving the book, the notices must be issued and served with all diligence. I find no authority and know of no statute authorizing the postponement of the filing of the docket by the Tax Collector with the Probate Judge or the postponement of the issue of the notice by the Probate Judge and the service thereof by the Tax Collector until April 1, or some other arbitrarily

chosen date. The book is required to be delivered to the Probate Judge on or before the first day of March and the notices are to be issued as speedily as practicable thereafter.

Yours very truly
A. A. CARMICHAEL,
Attorney General

March 18, 1936.

Hon. W. L. Hobbs, Clerk,
Circuit Court, Russell County,
Phenix, City, Alabama.

Section 7287 Code of 1923, where it refers to certain costs in attachment suits has no reference and cannot be made to apply to the actions in detinue.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of March 4, 1936, in which you request my opinion as follows:

"Volume three (3) of the Code of 1923, page 601, last paragraph on said page reads as follows: 'When an attachment is by him levied on personal property, which is replevied, or the cause is settled without suit, he is entitled, to one-half the commissions upon the amount of the demand sued for, allowing him for making money on execution, to be paid by the party paying such demand or replevying such property; and if such demand is afterwards collected upon execution, or other final process he must receive only one-half commissions; and if the plaintiff fails to obtain judgment, the amount so paid on the replevy of the property must be taxed as costs against him, and collected for the benefit of the defendant.'

"Has the above section any application where a suit in detinue is brought for the recovery of personal property and the cause is settled between the parties before judgment or execution."

My answer to your inquiry is in the negative. This paragraph applies only to attachment suits and has no reference to suits where detinue is resorted to in the recovery of personal property. See Section 7287, Code of Alabama, 1923, page 601, c/o Garnett, Sheriff v. Cobb 199 Ala. 80.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 18, 1936.

Hon. H. B. Hamner,
County Superintendent of Education,
Russell County,
Seale, Alabama.

Schools--term of trustees elected for definite term cannot be extended by County Board of Education (Section 133, School Code of 1927, amended by Acts 1935, p. 1090).

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of March 4, 1936, which is as follows:

"In May, 1934, at every school of Russell County, there were held mass meetings for the purpose of nominating six people for each school for school trustees. The County Board of Education then selected from the six people so nominated, three to serve as trustees for each school for a period of two years, from July 1, 1934 until June 30, 1936.

"Would the county board of education now have authority to increase the term of these trustees without the people's nominating anyone else? The County Board, in other words, wants the same trustees throughout the county to serve for another two year period, that is from July 1, 1936 until June 30, 1938. Would it be legal to extend their term this two years entirely by the action of the County Board of Education?"

I am of the opinion that your inquiry should be answered in the negative.

School trustees are elected under the provisions of Section 133 of the School Code of 1927, as amended by Acts 1935, p. 1090. This office has heretofore ruled that trustees so elected serve for such term as may be fixed by the County Board of Education.-- **Biennial Report of Attorney General, 1928-1930, pp. 307 and 380.** In my opinion, when the County Board of Education fixes a definite term, said term cannot be extended by them. New trustees should be elected under the provisions of Section 133 of the School Code as amended.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 18, 1936.

Hon. Homer F. Mitchell,
Judge of Probate, Cullman County,
Cullman, Alabama.

Taxation - Redemption - Parties redeeming land under Section 269 of the Revenue Act of 1935, as amended, are required to pay the amounts determined according to the method provided by Section 269 for the years subsequent to the year for which the property was sold, but are not required to pay taxes which, if regularly assessed, would not be due at the time of redemption.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of March 13 in which you state:

"Please give us an opinion on the following:

"Should the Probate Judge require payment of 1936 taxes in redemption of lands, sold to the State for taxes for previous years?

"We herewith enclose copy of letter of Henry Long, Land Commissioner, and would like to know if same is applicable to Cullman County.

"Please give us this information at once, as there are several parties who want to redeem their property, but do not feel that they should be required to pay 1936 taxes."

In reply, I call to your attention subsection (b) of Section 269 of the General Revenue Act of 1935 as amended by Act No. 526 approved September 14, 1935 (General Acts 1935, page 1113), which reads as follows:

"Upon application to the probate judge to redeem land, where the same has been sold to the State for taxes, which application shall be made on blank forms furnished by the State Land Commissioner, the Probate Judge shall submit such application to the Tax Assessor of the County in which the land sought to be redeemed is located and the Assessor shall, without delay, enter on such application an assessment value for each of the years for which taxes are due, subsequent to the year for which such land was sold to the State for taxes, and such assessment value shall be sixty per cent of the fair and reasonable market value of such lands as of October 1st of the year or years subsequent to the year for which the land was sold for taxes."

You will note that this subsection provides that the tax assessor shall "enter an assessment value for each of the years for which taxes are due subsequent to the year for which such land was sold."

I also note the letter which you inclosed from the Hon. Henry S. Long, State Land Commission, stating that the department is construing this provision to include taxes due.

From the language it would appear that the payment of subsequent taxes is limited only to the years for which taxes would be due had the same been regularly assessed. I am not positive what you mean by 1936 taxes. If you mean taxes which in an ordinary case would have been assessed as of October 1, 1935 and taxes due thereon in 1936, such amount is payable. However, if by reference to 1936, you mean the year in which property ordinarily would be assessable and on which taxes would not be actually payable until October 1, 1937, I am of the opinion that Section 269 does not require the payment of such amount as would be due October 1, 1937.

I also note your inquiry if the ruling of the State Tax Commission applies to Cullman County. It is needless it would seem to point out that the very essence of any tax law is its uniformity through the State and, of course, Section 269 applies to Cullman County as fully as to any other county in the State.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 20, 1936

Hon. H. W. Clayton, Clerk,
Circuit Court,
Marshall County,
Guntersville, Alabama.

The arresting fee and the attendance of officer of State Highway Patrolmen do not go to the patrolmen individually but must be collected

and transmitted to the Highway Patrol Department and credited to its fund.

Clerks of the Circuit Court are entitled to 5 per cent commission on all monies transmitted to the State.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 21, 1936, in which you request my opinion as follows:

"Please advise me as to what disposition should be made of the arresting fees, State Highway Patrolmen witness fees, and fines in cases where the State Highway Patrolmen make the arrest, and is the Clerk of the Circuit Court or the Clerk of the Court in which the case is finally disposed of entitled to five per cent commission on fines collected by him."

Answering your request, I call your attention to Section 11 of an Act approved September 2, 1935, General Acts, 1935, page 756, known as the Highway Patrol Act which is as follows:

"Section 11. For the enforcement of the provisions of this Act, to promote the public safety and generally to perform the duties imposed upon the Governor concerning the enforcement of all the laws, the Governor is hereby authorized to establish a State Highway Patrol to consist of a Chief of State Highway Patrol, whose salary shall not exceed $2750.00 per annum, two Captains of State Highway Patrol, whose salaries shall not exceed $2250.00 per annum, each, four sergeants of State Highway Patrol, whose salaries shall not exceed $1800.00 per annum, each, and such number of patrolmen as in his judgment is necessary, at a salary not to exceed $1500.00 per annum, each, and such clerical assistance, stenographers, etc., as may be deemed necessary, together with the expenses incident to the performance of the duties herein prescribed, to be approved by the Governor; provided, however, that no State Highway Patrol officer shall be entitled to any costs for attending any courts, but instead, the proper authorities shall collect such fees and mileage that are due such officers for attendance on any court or for any official act and to promptly turn same into the Highway Patrol Fund, and it shall become a part thereof, such fees and mileage to be expended as other moneys in said fund are authorized to be expended. Such officers and agents when so authorized in writing by the Governor, shall have the power of Peace Officers in the State and may exercise such powers anywhere within the State. All persons so appointed shall hold office at the pleasure of the Governor and may be removed or discharged by him with or without cause. The compensation of such officers, agents and employees shall be fixed by the Governor within the limits prescribed by this section and shall be paid by warrant drawn by the Comptroller on the State Highway Patrol Funds in the State Treasury, as also shall the necessary expenses of said Patrol, when approved by the Governor, and the Chief of said State Highway Patrol, with the approval of the Governor, is hereby authorized to purchase the necessary equipment to make effective the provisions of this Act, payment for which shall be made out of the

State Highway Patrol Fund as herein set out. Said officers, agents and employees shall perform all duties required of them by the Governor."

You will note this Section provides that neither the arresting fee nor the attendance of any employees of the State Highway Patrol as a witness or as an arresting officer goes to the officer himself, but must be collected and remitted to the State Highway Patrol and placed to the credit of such department.

You are entitled as clerk of the court to five per cent commission on all monies remitted to the State. I call your attention to an Act approved July 28, 1931, (General Acts, 1931) page 669, which is as follows:

"AN ACT

"To provide for the compensation of Clerks and Registers of the several Circuit Courts of this state for the collection and remittance of any sum or sums collected by such Clerk or Register for the State of Alabama.

"BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

"Section 1. That the Clerks and Registers of the several Circuit Courts of the State of Alabama shall receive five per cent of any sum or sums collected by such Clerk or Register for the State of Alabama, as compensation for the collection and remittance of the same, the said percentage to be deducted by such Clerk or Register making the collection from such sum or sums collected.

"Approved July 28, 1931."

Opinions of Attorney General, Vol. 4-A, page 125.

Of course you are only entitled to such commission when the money is transmitted to the State.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 21, 1936.

Hon. Gaston Scott, Chairman,
State Highway Commission,
Capitol.

House Bill 112, Approved October 6, 1932 (General Acts of 1932, page 68) construed- Load of poles, logs etc., to be hauled only under such permits as may be issued by the State Highway Commission as provided by paragraph (c) of Section 10; H. B. 112 (General Acts 1932, page 70).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of February 6, 1936 in which you request my opinion as follows:

"I am handing you herewith copy of H. Bill 112, Acts of 1932 which has to do with the regulation of motor trucks on the highways. Please refer to Section 7.

"This section provides that no person shall operate on any highway any motor-truck whose length, including any part of body or load, shall exceed 30 feet, nor any semi-trailer truck, whose length including any part of the body or load, shall exceed 40 feet, 'provided, however that loads of poles, logs, lumber and timbers may exceed the length herein fixed'.

"Please advise if in your opinion it was contemplated in the provision as to logs, lumber, timbers etc., in the above section that there should be no restriction at all on the lengths of such loads, or if it was intended that such loads could be hauled but under the permits as provided in Paragraph (c) of Section 10.

"I will thank you for your opinion as soon as possible as a large amount of such timbers are now being hauled in the southern part of the state and those handling the timber wish to comply with this section to the letter."

In my opinion, loads of poles, logs, etc., can only be hauled under such permits as may be issued by the State Highway Commission or the State Highway Department as provided by Paragraph (c) of Section 10 of H. B. 112 (General Acts 1932, page 70).

Section 7 regulates the lengths of loads to be carried on motor trucks or trailers as follows:

"No person shall operate on any highway any motor truck whose length, including any part of body or load, shall exceed 30 feet, nor any semi-trailer truck whose length, including any part of body or load, shall exceed 40 feet, 'provided, however, that loads of poles, logs, lumber and timbers may exceed the length herein fixed.' "

It is to be noted that the exception is granted in these words:

"Provided, however, that loads of poles, logs, lumber and timbers may exceed the length herein fixed."

This, in effect, is simply a grant of authority to haul the over-length commodities specified. There is nowhere contained therein any statement that the loads mentioned shall not be subject to such regulations as the Commission might see fit to impose. Indeed, in Paragraph (c) of Section 10 of the Act, supra, the Legislature "in the interest of public safety and the preservation of the highways" has given the Commission the authority to:

"Prescribe by order of general application rules and regulations for the issuance by it (without cost to the applicant) of special permits for stated periods not exceeding one year for the transportation of such over-sized, over-weight, or over-length commodities as cannot reasonably be dismantled, and for the operation of such super-heavy or oversize motor trucks, semi-trailer trucks, and trailers, whose gross weight, including load, height, width, or length, may exceed the limits prescribed by Section 4, 5, 6 and 7 hereof, or which in other respects fail to comply with the requirements of this Act, as may be reasonably necessary for the transportation of such oversize, overweight, or overlength commodities as cannot reasonably be dismantled."

Accordingly, before over-length commodities may be hauled on the highways of Alabama, the proper permit should be secured as provided by Paragraph (c) of Section 10 of House Bill 112, Approved October 6th, 1932 (General Acts 1932, pages 68-70).

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 23, 1936.

Hon. Roy L. Smith,
Attorney for County Commission,
of Russell County,
Phenix City, Alabama.

Witnesses--no time limiting the filing of claims for witness fees in criminal cases that are nol prossed. Same are payable out of fine and forfeiture fund and not out of general fund.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of March 7, 1936, which is as follows:

"The County Depository of Russell County and the County Commission of Russell County have had presented to them for registration and payment a series of witness certificates which had endorsed on the back thereof, on each certificate, the fact that the case was nolle prosequed by the State. These witness certificates were issued by the Clerk of the Circuit Court of Russell County to these witnesses, as witnesses for the State at the Spring Term 1925 and Fall Term 1924 of said Court.

"Please advise the Phenix-Girard Bank, County Depository, whether or not these certificates should be registered and if allowed to be registered, should they be paid?

"As I understand the procedure, witness certificates not presented within six years for registration and payment are barred, provided the court cost has been deposited for the payment of the same.

"I also understand that any funds in the fine and forfeiture fund for the benefit of witnesses which goes unclaimed for a period of four years automatically becomes a fund to be transferred to the general funds of the County. The County Commission would like to know whether or not they will be required to pay these certificates out of the general fund, in the event any funds have been transferred from the fine and forfeiture fund to the general fund, which had been placed in the fine and forfeiture fund for the benefit of these certificates."

In answer to your first inquiry, I am of the opinion that the witness claims in question are subject to registration and payment against the fine and forfeiture fund. This office has heretofore ruled that there is no time limiting the filing of claims for witness fees in criminal cases where a nolle prosequi is entered.--**Opinion of Attorney General to Clerk of Circuit Court of Madison County on July 17, 1935; Biennial Report of Attorney General,**

1930-1932, pp. 316, 440. See also **Briggs v. Coleman**, 51 Ala. 561; **Sessions and Leary v. Boykin**, 78 Ala. 328.

Section 7245, Code of 1923, which provides a limitation of six years for presenting witness claims, is applicable to only witness claims in civil cases.—**Biennial Report of Attorney General, 1930-1932, p. 316**, Supra.

Section 304, Code of 1923, provides for the transfer of the fine and forfeiture fund to the general fund. Said section provides as follows:

> "304. Transfer of fine and forfeiture fund to general fund.--The county treasurer of any county in this State may transfer any balance on hand at the end of the fiscal year of the fine and forfeiture fund in excess of the registered claim and lawful claims or charges against said fund to the general fund or to any special fund to which by resolution of the board of revenue, or court of county commissioners, expressed in writing and spread upon the minutes of the court, he may be directed."

I am unable to find any provision for an automatic transfer every four years to which you refer.

I am of the opinion that your second inquiry should be answered in the negative. I know of no provision under the general law which authorizes a payment of witness claims out of the general fund.

The above answers to both of your inquiries are based on the assumption that your county is operating under the general law in respect to the matters presented.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 25, 1936.

Hon. J. Lee Smith,
Judge of Probate, Chilton County,
Clanton, Alabama.

Commissioners Court - amount to be paid for publication of semi-annual report limited to one and one-half cents per word for each publication.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of February 17, 1936 in which you request my opinion as follows:

> "Acts 1935, page No. 1111, which is an amendment to Section No. 6767 of the Code of Alabama of 1923, and which in effect provides for 1½c per word for publishing the Treasurer's report in counties less than 40,000 population. The section amended provided not exceeding $100.00 for the costs of said publication in similar counties. In construing Section No. 6767 of the Code the Attorney General held that the $100.00 mentioned therein was the maximum amount that the County be allowed to cover the publication of the Treasurer's report, which meant the two semi-annual publications. Biennial Report of Attorney General, 1930 - 1932, page 1032.

"Chilton County is a county of less than 40,000 population and a local newspaper has printed the Treasurer's report and published the same in January, and has filed a bill before the Commissioners Court for 1½c per word for said semi-annual report. Will you, therefore, please advise me whether or not under the amended Act, Acts 1935, page No. 1111, that the 1½c per word means for each semi-annual publication or for both publications. In other words, I would presume if you construe the law to be that the 1½c per word covers both semi-annual publications then in that event the Commissioners Court would be limited to not exceed ¾c per word for each semi-annual publication."

As stated by you, Section 6767 of the Code of 1923 has been amended since this office rendered its opinion, supra, construing it. The Section now reads as follows:

"6767. PENALTY FOR VOTING AGAINST PUBLICATION.

——If the commissioners' court shall fail to make the said publication as required by the preceding section, each member composing said court who votes against said publication is made subject to a penalty of fifty dollars ($50.00), to be collected by suit; and the circuit or county solicitor shall bring said suit, and prosecute the same, in the name of the county as plaintiff. The compensation to be paid for the publication herein provided for shall not exceed one and one-half cents per word, in counties of less than forty thousand (40,000) population, according to the last or any subsequent federal census."

I am of the opinion that under this section as now worded a maximum of one and one-half cents may be paid for each word published in the January report and one and one-half cents for each word published in the July report. That is, a maximum of one and one-half cents per word may be paid for the **combined** number of words in the two reports.

Very truly yours,
A. A. CARMICHAEL,
Attorney General.

March 25, 1936.

Hon. H. B. Hamner,
County Superintendent of Education,
Russell County,
Seale, Alabama.

Schools--warrant issued March, 1935 and due October 1, 1936 cannot be extended but may be refunded under the provisions of Section 11 of Act No. 300, S. 351, approved September 2, 1935 (Acts 1935, p. 728). Borrowing money for extending school term is governed by Section 9 of said Act.

Opinion by Assitant Attorney General Screws.

Dear Sir:

I have your letter of March 4, 1936, which is as follows:

"In March, 1935, the Russell County Board of Education, before the budget law affecting county boards of education was passed, sold a district tax warrant for $1000.00, principal and interest due Sept. 30,

1936. Both principal and interest are to be paid out of the district tax collected during the year beginning Oct. 1, 1935 and ending Sept. 30, 1936. The proceeds from the sale of the warrant were used in the district to extend the school term in the Spring of 1935.

"Under the budget law affecting county boards of education could the due date of this warrant be extended one year, from Sept. 30, 1936 until Sept. 30, 1937, thereby releasing this present year's district tax in that district to extend school term this present spring? The man to whom the warrant was sold would probably be willing to wait another year for his $1000.00 but he wants to know that the extension of the one year would be legal?

"Would it be legal under the budget law to issue an entirely new warant to another person, due Sept. 30, 1937, the proceeds of the sale of which are to be used for extending the school term in the spring of 1936?"

I am of the opinion that your first inquiry should be answered in the negative. I know of no authority of law authorizing the extension of the note in question. However, since the debt was incurred prior to July, 1935, same is subject to refund under the provisions of Section 11 of Act No. 300, S. 351, approved September 2, 1935, (Acts 1935, p. 728) which is as follows:

"Section 11. WARRANT MAY BE ISSUED TO PAY DEBTS CREATED PRIOR TO JULY 1, 1935. -- In order to pay debts not otherwise funded which were incurred for legitimate obligations prior to the first day of July, 1935, any county board of education or any city board of education may borrow money and as security therefor, or in payment of such loans shall issue callable warrants or execute promissory notes bearing interest at a rate of not to exceed six per cent per annum, payable at such time as may be agreed upon; or may sell such warrants or notes at par and use the proceeds in the settlement of such debts. All warrants or notes so issued shall be payable out of such school funds of the county or city as may be available for such purposes. Payments of principal and interest on such warrants or certificates of indebtedness shall be arranged so as to require approximately equal payments each year over a period of not to exceed fifteen (15) years. When these outstanding debts have been funded in accordance with the provisions of this section, no other warrants may be issued or debts incurred, except in accordance with the provisions of this Act."

The answer to your second inquiry is governed by Section 9 of Act No. 300, supra, which is as follows:

"Section 9. FUND MAY BE BORROWED AGAINST REVENUES OF CURRENT YEAR.- Any county board of education or any city board of education shall have authority upon the recommendation of the county superintendent of education or city superintendent of education, as the case may be, to borrow money on the credit of the school fund of that county or city to meet the salaries of teachers and other current expenses when the current funds on hand are not sufficient to meet the same, and as security therefor, to pledge the current revenues of the current fiscal year. It shall be the duty of the county board of education and the county superintendent of education or city board of

education and city superintendent of education to secure such a loan if practicable, when the current funds on hand are not sufficient promptly to pay teacher's salaries and other current expenses. All such current loans shall be due and payable not later than the end of that fiscal year. Provided, however, that the county board of education or the city board of education may issue certificates of indebtedness for payment of current expenses which are due when funds on hand are not sufficient to pay such obligations and when an adequate loan cannot be secured. Such certificates of indebtedness shall become due and payable not later than the close of the fiscal year in which they are issued and shall pledge the current revenues of that fiscal year. At no time shall loans be secured or certificates of indebtedness be issued for current expenses during any year which shall pledge school revenues of any other fiscal year. The amount which is borrowed either by loan or certificate of indebtedness, shall at no time exceed one-third of the sum paid for all current expenses, including teachers' salaries during the preceding school year. Boards of education shall have authority to pay interest at the rate of not exceeding six per cent (6%) per annum on such loans or such certificates of indebtedness as may be issued."

In issuing certificates of indebtedness under this section its terms must be strictly followed.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 25, 1936.

Hon. I. T. Quinn, Commissioner,
Department of Conservation of Game, Fish and Seafoods,
Capitol.

All monies arising from licenses issued by the Commissioner of Licenses of Jefferson County, as provided by the Act approved August 12, 1935, General Acts 1935, page 632, must be remitted to the State Treasury and credited to the Department of Conservation of Game and Seafoods. The Commissioner of Licenses of Jefferson County is without authority of law to retain the 15c commission provided in said Section.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of March 4, 1936, in which you request my opinion as follows:

"By an Act of the Legislature of Alabama, No. 220-S-266-Swift, approved August 12, 1935, Judges of Probate, Commissioners of Licenses, Commissioner of Conservation of Game, Fish and Seafoods and such persons not residing at the county seat as may be appointed by the Commissioner of Conservation are required to sell to applicants for same hunting and fishing licenses and fur catchers licenses.

"Section 42 of the Act supra provides that 'Judges of Probate and other persons authorized and designated to issue licenses shall retain out of the money received for each license issued, the following amounts, viz:-

County hunting and State hunting licenses, non-resident hunting and non-resident fishing licenses, fifteen cents each, which fees shall cover services required by the provisions of this Act, and shall remit the balance to the Commissioner on the first of each month, which balance shall be covered into the State Treasury to the credit of the Game and Fish Fund.... Provided, however, that if any such license is issued by the Commissioner or by any Probate Judge who is paid a salary for the performance of his duties as such Probate Judge, or by any License Commissioner authorized by statute to issue hunting, fishing and commercial fur licenses and who is paid a salary as such License Commissioner, he shall be required to remit the entire amount collected to the Commissioner to be covered by the Commissioner into the Game and Fish Fund.'

"Pursuant to the provisions of the Act supra the Commissioner of Conservation consigned to License Commissioner, Honorable Eugene B. Henry of Jefferson County, license blanks for the issuance of hunting, fishing and fur catchers licenses.

"In the performance of his duties required of him under the law, for which he is paid a salary, Mr. Henry sold hunting, fishing and fur catchers licenses and has made remittance to this office of the proceeds less fifteen (15c) cents for each license sold.

"On October 8, 1935, I addressed a letter to License Commissioner Henry, prior to his remittance for the first month of the present fiscal year and called attention to the fact that he would be required under the law to remit to the Commissioner of Conservation the **entire** proceeds from the sale of hunting, fishing and fur catchers licenses.

"Again on November 21, 1935, I addressed another letter to Mr. Henry, and received a letter from County Attorney Ernest Mathews, which I enclose herewith, together with my reply, for your information.

"I am also enclosing for your information another letter which I addressed to Mr. Henry on December 13, 1935, a copy of which went to County Attorney Mathews. To this letter I have had no reply.

"I would thank you for an opinion as to whether under the law License Commissioner Eugene B. Henry is entitled to retain out of the proceeds from the sale of hunting and fishing licenses a fee of fifteen (15c) cents for each license issued, or is he required to remit to the Commissioner of Conservation the entire proceeds from the sale of such licenses."

My answer to your inquiry is in the negative. I call your attention to Section 42 of an Act approved August 12, 1935, General Acts 1935, page 632, which is as follows:

"Section 42. Judges of Probate and other persons authorizing and designated to issue licenses shall retain out of the money received for each license issued, the following amounts; viz. county hunting and state hunting licenses, non-resident hunting and non-resident fishing licenses, fifteen cents each, which fees shall cover services required by the provisions of this Act, and shall remit the balance to the Commissioner on the first of each month, which balance shall be covered into the State Treasury to the credit of the Game and Fish Fund, and said Judges of Probate and all other duly authorized and designated persons shall report to the Commissioner on the first day of each month the number

and kind of licenses issued and the name and post office address of the person or persons to whom issued, giving opposite each name the serial number of the license so issued, and the amount of money remitted. Provided, however, that if any such license is issued by the Commissioner or by any Probate Judge who is paid a salary for the performance of his duties as such Probate Judge, or by any License Commissioner authorized by statute to issue hunting, fishing and commercial fur licenses and who is paid a salary as such License Commissioner, he shall be required to remit the entire amount collected to the Commissioner to be covered by the Commissioner into the Game and Fish Fund."

I have read the opinion of Hon. Ernest Mathews, County Attorney of Jefferson County given to Mr. Eugene B. Henry, Commissioner of Licenses, Jefferson County, and have studied the authorities cited by him and I do not consider the facts in connection with the cases cited by him applicable to the facts in the matter we have before us. For instance, the case of Vaughn v. State, 103 So. 38, cited in his opinion, here the Legislature attempted to change the law as to ex officio fees of Clerks of the Circuit Court in certain counties of Alabama. Of course, this would be in violation of Section 96 of the Constitution which is as follows:

"Sec. 96. The legislature shall not enact any law not applicable to all the counties in the state, regulating costs and charges of courts, or fees, commissions or allowances of public officers."

I also find this true as to the other cases cited by him. In the case here under consideration there is no attempt to change any fee going to county officers but provides for the distribution of the same. It simply provides that the Judge of Probate or other officer charged with the duty of issuing a license and collecting for the same, if he is not paid a salary, may retain 15c of same for such service but if he is paid a salary then in this event he must remit the full amount collected. The Commissioner of Licenses of Jefferson County is charged with the duty of issuing and collecting these licenses and remitting the same to the State to be placed to the credit of the Game and Fish Fund. The Commissioner of Licenses of Jefferson County is paid a salary and, this being true, he is not entitled to retain this commission but must remit the whole amount collected in accordance with Section 42 of an Act approved August 12, 1935, General Acts 1935, page 632. The Act does not change in any particular the fee or allowance to be paid but simply changes the method of distribution. The Act does have a uniform application to all the counties of the State and provides that an officer who is charged with the duty of collecting and transmitting the same, and who is not on a salary, may retain 15c from such license as his fee for collecting and transmitting same. On the other hand if such officer is on a salary he cannot retain any portion of the same but must transmit the whole license as provided by Section 42, supra.

The Commissioner of Licenses cannot appropriate this fee to himself as under the law he is on a salary. Then, if he retains it and cannot receive it himself, where does it go? Certainly not to the County, as all of these funds must come to the State and be credited to the Game and Fish Department. I call your attention to an opinion of this office written April 16, 1935, Office Edition, Attorney General, Book 3-A, page 191. Also Birmingham Electric Company v. Henry, 215 Ala. 458.

Furthermore, the salary of the Commissioner of Licenses of Jefferson County is fixed by statute. See an Act approved July 16, 1931, General Acts 1931, page 522, Section 1. At the time the salary was fixed, the power of collecting all licenses was a part of his duty and now he cannot claim this was an additional duty not contemplated by the Act and, therefore, would make him entitled to receive these commissions as an extra compensation.

It might be well in this connection to call attention to a written opinion of this office to Hon. W. W. Hill, Judge of Probate of Montgomery County. In this opinion we held that the Judge of Probate of Montgomery County was not compelled under the law cited above to remit all the licenses collected under the Game and Fish Law to the State Treasurer to be credited to the Department of Conservation, but this was based on a Constitutional Amendment peculiar to Montgomery County, which provides a different disposition of these fees insofar as Montgomery County was concerned. I called attention to the constitutional amendment of 1915, General Acts, 1915, page 211, which amendment placed all county officers of Montgomery County on a salary basis and provided further "that the above named officers shall collect the fees heretofore collected by them and shall cover such fees into the County Treasury on the first day of each month". Jefferson County has no such provision in its constitutional amendment and therefore the opinion to Judge Hill above cited is not in conflict with what we are holding in this opinion.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 26, 1936.

Dr. A. H. Collins,
Director of Public Welfare,
Capitol.

Department of Public Welfare—

1. The term "County governing body" held not to include city governing bodies.

2. The term "County treasury" as used in S. B. 397—Simpson, Acts of 1935, page 967, Section 2 held not to include city treasuries.

3. City governing bodies held not charged with the duty to provide for old age assistance under Acts of 1935 ,page 967.

4. The term "general fund of the county" as used in Section 6, Acts of 1935, page 967 held not to apply to cities.

5. Estimates of amount to be expended by county for old age assistance for "ensuing three months" held to be made by "County Board of Public Welfare."

6. Payments to counties for expenditures "during ensuing three months" held to be payable in advance under the requirement that state payments be regulated so as to reimburse counties for any amount expended in excess of estimated amount for "ensuing three months."

(1) Amount to be increased or decreased according to expenditure of county during previous three months as measured by estimated amount.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of March 9th in which you request my opinion as follows:

"Will you please give me an official opinion concerning the following points relative to the Old Age Pension Act No. 448 (S. 397—Simpson):

"1. Does the term "County governing body" as defined in section 1 of the Act include city governing bodies?

"2. Does the term "County treasury" as used in Section 2 of the Act include city treasuries?

"3. If the answers to questions 1 and 2 above are affirmative are all cities to be dealt with as independent units in the administration of the Act?

"4. If the answers to the questions 1 and 2 above are negative are cities charged with the duty "to provide a reasonable subsistence in proportion to the accustomed standard of living of the applicant to each person eligible for an old age pension under the provisions of this Act"? (See Section 4.)

"5. Does the term "general fund of the county" as used in Section 6 apply to cities as well as counties?

"6. Section 15 of the Act states that "the State of Alabama shall quarterly, upon requisition of the State Department, pay each county a sum in money equivalent to three-fourths of the amount estimated to be expended by the county during the ensuing three months for relief for each old age pensioner.' By whom is this estimate to be made? It appears from Section 19 that the 'County Board' makes this estimate. In Section 1 it is stated that 'the term 'County Board' as used in this Act shall mean the County Board of Public Welfare'.

"7. In Section 16 of the Act it appears that state and federal funds for Old Age Pensions are to be available in advance to the county upon the basis of estimates of expenditures 'during the ensuing three months'. In Section 26 it appears that the State funds are made available to the counties in the form of reimbursements. Will you give me an opinion on these two sections as they pertain to the Administration of State and Federal funds."

In my opinion, your first question must be answered in the negative. I refer you to Acts of 1935, page 967, Section 1 which provides in part as follows:

"The term 'county governing body' as used in this Act shall mean the Board of County Commissioners, Board of Revenue, Court of County Commissioners or other court or board of like jurisdiction of a County in this State . . . "

The terms "county governing body" and "city governing body" are two separate and distinct political subdivisions, one geographically included within the other, but in respect to government, they are entirely separate and distinct. Since the law provides for both forms of government separately, in my judgment, the Act here in question does not contemplate the use of these terms synonomously.

In reply to your question numbered two, I wish to advise that for reasons set out in answer to your question numbered one, it must necessarily follow that the answer here must be in the negative.

For answer to your third question, I wish to refer you to the answer of your questions numbered one and two.

Your fourth question must be answered in the negative. I refer you to Section 4 of the above named Act which sets out the only requirements of said Act placed upon the political subdivisions of the State for the purposes here named. You will note that this section sets requirements upon the "county governing body" only.

Your question numbered five must likewise be answered in the negative. The "general fund of the county", in my judgment, under the provisions of the law does not contemplate city funds. Section 6 of the Act referred to by you uses the term "County governing body" exclusively, which is defined by Section 1 of said Act to be applicable to the county. (See further, reasons set out in answer to question numbered one.)

In reply to your sixth question, I wish to advise that in my opinion, the "County Board" or "County Board of Public Welfare" is required to make the estimate of the amount to be expended by the county during the ensuing three months. I refer you to Sections 1 and 18 of the said Act which provide in part as follows:

"The term 'County Board' as used in this Act shall mean the County Board of Public Welfare."

"(2) One-half of such funds shall be apportioned to the several County Departments in the proportion to the estimate of the County Board of the total sum, to be expended by their counties for old age pensions in the next quarter, reduced or increased, as the case may be, in proportion to any sum which the State Board finds that any County Board in its estimate for any prior quarter was greater or less than the amount actually paid in old age pensions. The State of Alabama shall pay to the County Departments the amounts so apportioned at such times and under such rules relative to such payments as may be prescribed by the State Department."

In reply to your question numbered seven, I wish to refer you to Section 16 of the above named Act which provides in part as follows:

"Section 16. The State of Alabama shall quarterly, upon requisition of the State Department, pay each county a sum in money equivalent to three-fourths of the amount estimated to be expended by the county during the ensuing three months for relief for each old age pensioner who han been granted relief under the provisions of this Act, increased or decreased, as the case may be, by any sum which for any prior quarter

was greater or less than three fourths of the amount actually expended by the County under the provisions of this Act."

You will note from the above quoted sections the commands for payment in advance are for the ensuing three months but makes a provision that said amount shall be any sum which for any prior quarter was greater or less than three-fourths of the amount actually expended by the county under the provisions of this Act.

Referring to Section 26 of said Act, in my judgment payments to the counties here considered amount to reimbursement for any funds the county may have expended, in excess of the estimated amount for "the three months ensuing". The provisions of Section 26 of the said Act, supra, provide for distribution in case of shortage of funds by either the State or County Departments of Public Welfare but do not change the requirements of Section 16.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 26, 1936.

Hon. M. F. Elrod, Chairman,
Board of Revenue, Marshall County,
Guntersville, Alabama.

Counties—under the provisions of Section 7 of Act No. 379, H. B. 191, approved September 9, 1935, (General Acts 1935, p. 803), known as the "County Financial Control Act," no warrant or order for money shall be issued until funds are available for its payment.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of March 12, 1936, which is as follows:

"In view of Section 7 of the Lee Act or County Financial Control Act, Acts of 1935, page 903, what action shall I take with regard to current claims audited and allowed by the Board of Revenue?

Section 7 of Act No. 379, H. B. 191, approved Sept. 9, 1935, (General Acts, 1935, p. 803), known as the "County Financial Control Act", provides as follows:

"Section 7. NO WARRANTS ISSUED UNTIL CASH IS AVAILABLE. No warrant or order for money shall be issued in pursuance of authority of the Board of Revenue, County Commissioners or other like governing body until funds are available for its payment upon presentation to the Treasurer or depositary. It shall be the duty of the Board of Revenue, County Commissioners or other like governing body, to provide and appropriate funds for paying warrants issued upon orders drawn by other county officials in pursuance of law, which orders are not required by law to be approved and authorized by such Board."

In view of the above, it is my opinion that no warrant or order shall be issued until funds are available for its payment. This is true although the claim may have been audited and allowed by the Board of Revenue. The

claims in question will have to be held until there is money available for their payment before warrants can be issued for same.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 26, 1936.

Hon. W. A. Austin, Sheriff,
Elmore County,
Wetumpka, Alabama.

1. Probate Court exercising jurisdiction of Juvenile Court—Sheriff's costs and fees same as allowed for like services in Circuit Court, and are paid by the county out of the General Fund.

2. Sheriff allowed only $5.00 for summoning jury in capital cases which is paid out of the County Treasury. Sheriff allowed reasonable amount.

3. Shriffs allowed reasonable amount for use of his automobile when used in performing his duties in non-support cases.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I wish to acknowledge receipt of your letter of January 17, 1936, in which you state:

"Since I have been sheriff of Elmore County there have been numerous juvenile cases before the Probate Court and in each instance I have done the best I could to execute all papers delivered to me by the court and have performed my duty toward such juveniles as well as possible, but I do not know through what source and how to receive compensation for my services. I have read Section 3558, Code of 1923, which is plain as far as it goes, but it does not appear to be entirely applicable."

You request my opinion:

"1. I am requesting you to advise me in detail what steps I must take, and procedure to follow in getting my pay for such services, and with whom to file my claim. There are numerous duties connected with the procedure in juvenile cases not mentioned in circuit court procedure and there are very few 'like services' as mentioned in the section referred to. Juveniles are not handled by the convict department and therefore when one is convicted, the convict department does not pay costs. It appears from the above mentioned section the expenses for feeding juvenile delinquents should be paid from the same source defendants in circuit court are, but the state refused to feed them. If the county pays such feed bill, how much should it pay? Who pays for the other services.

"2. I am also asking that you advise me what procedure to follow in getting pay for summoning jurors in capital cases. If there is more than one capital case set for the week and the special venire is drawn for the first case set, and for all the other cases set for the week, is the

sheriff entitled to compensation for his service in each case. From what source are sheriffs paid for such services.

"3. I notice that Section 4492 Code of 1923 provides that the Court of County Commissioners shall make suitable allowance for the sheriff for actual disbursements in performing his duties in non-support cases. Under this section is a sheriff entitled to a reasonable allowance for the use of his automobile when used in executing processes in such cases? To receive such compensation as he is entitled, should a sheriff file his claim with the Commissioners Court as other claims against the county are filed?"

In answering your first ouestion, I call your attention to a part of Act No. 295, S. B. 429, approved September 18, 1923, (General Acts 1923, p. 298) which is as follows:

"Section 3. COURTS HAVING JURISDICTION OF CHILDREN, WARDS OF THE STATE. The probate courts of the several counties of the State, except in those counties in which special courts having exclusive jurisdiction over children under 16 years of age or over and for the purposes declared in this Act have been or shall hereafter be established by special acts of the Legislature, shall have original and exclusive jurisdiction of all proceedings coming within the provisions and terms of this Act and shall have original and exclusive jurisdiction to hear, determine and adjudicate all questions and cases coming within said provisions and terms and each such court shall in the exercise of the jurisdiction herein conferred by this Act, be known as the Juvenile Court of .....County. * * * "

As the Probate Court of Elmore County, is acting as a Juvenile Court in exercising its authority over children, your first question is governed by Section 3558 of the 1923 Code of Alabama, which is as follows:

"3558. Officer serving process, etc., under juvenile courts; costs and fees of.—All officers serving process from juvenile courts, or feeding prisoners committed by, or held for or under such courts, shall receive the same costs, fees and compensation payable in the same manner and from the same source as are now allowed and paid for like services with respect to process issued by the circuit courts or courts of like jurisdiction, and for feeding prisoners committed by circuit courts or courts of like jurisdiction."

Such costs and fees as are properly chargeable under the section, supra, are payable by the County out of its General Fund.

I call your attention to a part of Section 3529, Code of 1923, as amended by Acts 1931, p. 356, which is as follows:

"All expenses necessary or appropriate to the carrying out of the purposes and intent of this chapter and all expense of maintenance and care of wards of the court that may be incurred by order of the court in carrying out the provisions and intent of this chapter, shall be valid charges and preferred claims against the county and shall be paid by the county treasurer, when itemized and sworn to by the creditor or other person knowing the facts in the case, and approved by the judge."

The costs incurred in feeding juveniles are to be paid by the county, under the section supra.

This office has ruled that when one is committed to the jurisdiction of the Juvenile Court, he is not a "prisoner" within the meaning of Section 4827-4828, as amended, but becomes a ward of the State.—**Biennial Report of Attorney General 1930-1932, p. 571; Opinion of the Attorney General to Hon. J. R. Hardy, Sheriff, Chilton County, June 12, 1935** (In ms.); **Opinion of Attorney General on January 10, 1936 to Hon. C. N. Corprew, Sheriff of Tallapoosa County,** (In ms.)

In answering your second question, Section 3741 of the 1923 Code of Alabama, allows a fee of only five dollars "for summoning jury in capital case or at any special court for the trial of criminal to be paid out of the county treasury." The sheriff is allowed only one fee of five dollars which is paid out of the county treasury—**See Biennial Report of Attorney General, 1918-1920, p. 196; Biennial Report of Attorney General 1930- 1932, p. 379.**

In answer to your third inquiry, I am of the opinion that under Section 4492 of the 1923 Code of Alabama, the county commissioners, or board of revenue, may properly allow the sheriff a reasonable amount for the use of his automobile, when used in performing his duties in non-support cases. The sheriff's claim for such allowance should be filed in the same manner as his other claims are filed.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 26, 1936.

Hon. Henry S. Long, Chairman,
State Tax Commission,
CAPITOL.

Attention Hon. J. N. Howard, Manager Coal Tonnage Tax .

Taxes—Limitation of Action—

The limitation of six months for civic actions for the recovery of taxes levied by Schedules 91 and 92 of Section 348 of the 1935 Revenue Act applies only to taxes due subsequent to the effective date of such Act and does not change the statute of limitations as to any liability created under former laws.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of March 16th, in which you state:

"I will appreciate it if you will at your earliest convenience give me your opinion as to whether that part of House Bill 324, Article 13 Chapter 8, Schedule 160.22, which limits the time to six months within which civil action can be commenced, applies to production of coal and iron ore before this law became effective."

In reply, I call to your attention the latter portion of Schedule 160.22 of the 1935 General Revenue Act which provides:

"All civil actions by the State or any subdivision thereof for the recovery of amounts claimed for licenses, franchise taxes or other taxes levied under Schedules 91 and 92 of Section 348 of this Act shall be commenced within six (6) months after the severance of the Coal and/or Iron Ore, and/or the removal thereof from the mine, and unless commenced within such period of Six (6) months shall be forever barred."

As will be noted, this provision is included in the Chapter under insurance, but this is clearly an erroneous inclusion, as it is a provision in the nature of a general provision but limited in its application to the taxes levied under Schedules 91 and 92 of Section 348 of this Act.

You ask me if the limitation of six months included in this proviso applies to liability for tonnage taxes arising prior to the passage of the 1935 Revenue Act.

In my opinion, it does not. The language of the statute limits it to the taxes levied under Schedules 91 and 92 of Section 348 of this Act. Nothing is said as to any tax levied by prior laws. This conclusion is emphasized, if not absolutely determined, by Section 412, which provides:

"Nothing in this Act shall be construed to relieve any person from any tax liability, penalty or forfeiture incurred under laws existing before the effective dates of the provisions of this Act, and any provisions of any laws existing before the effective dates of the provisions of this Act, providing for the collection and enforcement of such tax liability, penalty, or forfeiture shall, as to such tax liability, penalty or forfeiture, remain in full force and effect."

It would certainly appear that a liability having arisen prior to the effective date of the 1935 Act is under the specific terms of Section 412 not affected by the 1935 Act. Is is my judgment that this be true, even as to the statute of limitations, and especially is it true where the change in the statute of limitations is limited to taxes levied by certain provisions of the Act.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 26, 1936.

Hon. Clarence A. Norton,
Tax Assessor, Barbour County,
Clayton, Alabama.

Taxes—Assessment.

Under facts set out property sold for taxes and purchased by individual should be thereafter assessed to the purchaser.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of February 18, 1936, stating:

"Please give me an opinion on a subject as follows: In 1933 A owned a piece of property in Barbour County on which the taxes were assessed to him in regular form, also in 1934 which were due Oct. 1, 1934, but he

failed to pay them and same were advertised and sold for amount of taxes and expenses due in accordance with the statutes of Alabama for such, and B purchased same at tax sale on the 17th day of September, 1935, paying the 1934 taxes. Now B failed to have or give in this property for 1935 which A had also failed to do. Now I as Assessor find this to be an escape for 1935 and B wants to pay same which he does, but a question is Who should this be assessed to as an escape for 1935, A or B. B did not come into possession until September 1935."

I am not perfectly clear as to the facts stated in your request and I am restating them according to my understanding, and the opinion is based on such understanding.

The property was assessed as of October 1, 1933 to A. Taxes thereon became due in 1934 and the property was sold for such taxes in September, 1935, as assessed to A. As of October 1, 1934, the property was again assessed to A and taxes would have become due thereon October 1, 1935, except that the same had been sold to the State prior to October 1st. At such sale, B bought the property sold under the October 1, 1933 assessment and at the time, or subsequent thereto, paid the amount due under the 1933 assessment and also the amount due under the October 1, 1934 assessment. For the tax assessment year beginning October 1, 1935, no assessment was made. You desire to know to whom the property should be assessed. It appears from your statement that as of October 1, 1935, B was the owner and the property should be assessed as an escape to B.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 26, 1936.

Hon. Roy Johnson,
Tax Assessor, Jefferson County.
Birmingham, Alabama.

Taxation.

1. Where property is sold to the State for taxes, the title passes to the State.

2. The lien of the State for taxes is superior to all other liens, including those of municipalities.

3. Where a municipality forecloses or attempts to foreclose a public improvement assessment, against property which has been sold to the State for taxes, it cannot legally acquire title or possession to such property until it redeems from the tax sale to the State, or otherwise satisfies the prior lien of the State.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of March 5, 1936, in which you state:

"I have a letter from Mr. C. E. Armstrong, Comptroller for the City of Birmingham, in which he states that the City has taken over a number of pieces of property for street improvement. They have repaired

the houses and are collecting rents. They ask that we exempt these properties from taxation. In this connection it would seem to me that the State should have prior lien, as the same pieces were sold for taxes. I would like to know whether or not we should call on the City of Birmingham for payment of back taxes before we mark these properties "Exempt—City Property." It would seem to me, also, that the State should have the right to collect the rents just as much, if not more so, than the City of Birmingham.

"The question also comes to mind as to whether or not property can be marked exempt for subsequent years when it is owned by the State. The Legal Department of the City of Birmingham tells me that the City has prior claim and that their claim dates from the date of the ordinance providing for the improvements under which the City sold the property.

"I fear that under the present system, if we mark these properties exempt as City owned property, that we will lose sight of the fact that the State has a claim for back taxes when, and if, the City might sell this property to an individual."

In reply, I beg to advise that Section 372 of the Revenue Act of 1935 provides for the lien of the State and County for taxes and likewise for municipal corporations and provides further that these liens shall be superior to all other liens **"and shall exist in the order named."** This section is practically in the same words as Section 416 of the Acts of 1919, page 282. It appears therefore, that the lien of the State is prior to all other liens and that the lien of the county is prior to all others except the State.

This section applies primarily to ad valorem taxes. But, its language is so sweeping that the lien of the State is, in my judgment, necessarily superior to any lien of a municipality whether for ad valorem taxes or improvement assessments. However, by Section 2199 of the Code, 1923, the superiority of the lien of the State and County for ad valorem taxes is specifically provided for. This section provides:

"At such meeting or any adjourned meeting the council shall proceed by order or resolution to fix the amount of the assessment against each lot or tract of land described and included in said assessment roll, and all such assessments, from the date of such order or resolution, shall be and constitute a lien on the respective lots or parcels of land upon which they are levied, superior to all other liens, except those of the State or County for taxes."

It would appear from your letter that the property in question has, prior to the enforcement by the city of its public improvement lien, been sold to the State for taxes in satisfaction of the State's prior lien.

Section 2202 provides that an individual purchaser of property at a tax sale acquires it subject to the public improvement lien of the municipality, yet if the State itself purchases it, there is no authority for the municipality to enforce its lien against the State and the State in foreclosing its prior lien is entitled, in my judgment, to possession of the property—See opinion to Eugene H. Hawkins, Judge of Probate, Jefferson County, Quarterly Report of the Attorney General October-December, 1935, page 207.

The property being sold to the State, the municipality, in order to protect itself, may redeem from the state or by payment of the proper amount, or have the State's certificate of sale, assigned to it.

Your particular question as to marking the property exempt, is not exactly compatible with the facts. As the property has been sold to the state, the title is in the State and there is no occasion for any assessment. The City is not entitled, in my judgment, to possession until the lien of the State is satisfied. Should such lien be satisfied, then the property should be listed as city property and exempt.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 28, 1936.

Hon. W. L. Hobbs,
Clerk and Register, Russell County,
Phenix City, Alabama.

A clerk may charge fifteen cents per hundred words for making final record even though he uses a partly printed record for making the same.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of November 30, 1935, in which you request my opinion as follows:

"For making FINAL RECORDS under section 3667-3739 Clerks of the Circuit Courts are allowed fifteen cents per hundred words, the total cost for each final record not to exceed $3.00.

"The sheets furnished to make this final record has some of the words of the record printed thereon (regular form), the most of the record has to be typewritten on the form sheets.

"Kindly advise if the Clerks are allowed to charge at the rate of fifteen cents per hundred words for the entire record including the words on the printed form."

The charge of fifteen cents per hundred words for making final record in criminal cases under Section 3667, Code of Alabama, 1923, can be made even though you use the form partly printed. The fee is for making the record and the method used has nothing to do with the charge. I am unable to find where this question has been passed on by either of the courts of last resort or by this office, but I think the conclusion reached above is correct. See Corpus Juris, 53, pp. 611-612 (method of recording) and citations there made.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 28, 1936.

Hon. Henry S. Long, Chairman
State Tax Commission,
The Capitol.

Tax Assessors—

(1) Section 55 of the General Revenue Act of 1935 repeals Senate Bill 175 approved October 11, 1932, relieving Tax Assessors from making book of assessments.

(2) Local laws are not repealed.

Opinion by Assistant Attorney General Moore.

Dear Sir:

I have your letter of November 7, 1935, as follows:

"Section 55 of House Bill 324 approved July 10, 1935 requires the tax assessors of the several counties to make a book of assessments, with the proviso 'that in counties where assessors are now allowed by law to use assessment lists in lieu of a book of assessments, the assessor shall not be required to prepare a book of assessments, as provided for in this section.'

"At the time that House Bill 324 was enacted, Senate Bill 175 approved October 11, 1932 was the controlling statute and under its terms relieved the tax assessors of all counties in the State of Alabama where there are no local laws providing to the contrary, from the duty of preparing the book of assessments.

"Inasmuch as the prevailing law relieved all assessors from making a book of assessments at the time that Section 55 of House Bill 324 became the law, it would appear that the proviso using the words 'where assessors are now allowed by law to use assessment lists in lieu of the book of assessments' would have the effect of nullifying the main provisions of Section 55, unless the quoted proviso be interpreted to refer to those counties where assessors were allowed by local act to use the assessment list in lieu of the book of assessments.

"In view of this apparent conflict in the provisions of this section we find it necessary to ask your formal opinion as to whether or not those assessors in counties which have no local laws relating to the subject are now required to make an assessment book as provided for by Section 55 above referred to."

In reply to your letter it is my opinion that the provision "where assessors are now allowed by law to use assessment lists in lieu of the book of assessments" referred to by you necessarily applies to counties which have local acts so providing. If it should be held that the Act of 1932 to which you call my attention is not repealed by Section 55 of the General Revenue Act, of 1935, then Section 55 is totally meaningless, and would have no field of operation. The intention seems to be to repeal the 1932 Act, else the same would have been reenacted or the subject omitted entirely.

As a general rule a local act is not repealed by a general act in the absence of clear legislative intent to repeal unless there is no field of opera-

tion for both. I am of the opinion that the proviso above quoted was intended and shows the intent not to repeal local enactments on the subject.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 30, 1936.

Hon. W. E. Butler,
Judge of Probate,
Madison County,
Huntsville, Alabama.

Elections—name of candidate, failing to comply with the provisions of Section 588 of the Code of 1923 relative to filing name or names of committee handling his campaign expenditures, or himself as said committee, should not be placed on ballot. (Section 589, Code of 1923).

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of March 20, 1936, in which you request my opinion as follows:

"If a candidate fails to file with the proper authorities within five days after the announcement of his candidacy the name or names of the committee handling his campaign expenditures, or himself as said committee, under the provisions of Section 588, Code of 1923, should the name of said candidate be placed on the ballot if his name appears on the list furnished by the party committee and he later files the necessary declaration of appointment or selection?"

I am of the opinion that your inquiry should be answered in the negative. Section 588, Code of 1923, provides as follows:

"Section 588. Committee to receive, expend, audit and disburse money or funds contributed.—Any candidate shall, within five days after the announcement of his candidacy for any office, if the office be a state office, file with the secretary of state, and if the office be a county office, file with the judge of probate of said county, and if it be a district or circuit office, file with the judge of probate of each county which is embraced in said district or circuit, the name of not less than one nor more than five persons elected to receive, expend, audit and disburse all moneys contributed, donated, subscribed, or in any way furnished or raised for the purpose of aiding or promoting the nomination or election of such candidate, together with a written acceptance or consent of such person to act as such committee, but any candidate may, if he sees fit to do so, declare himself as the person chosen for such purpose. Such committees shall appoint one of their number to act as treasurer, who shall receive and disburse all moneys received by said committee; he shall keep detailed account of receipts, payments and liabilities. The said committee or its treasurer shall have the exclusive custody of all moneys contributed, donated, subscribed, or in any wise furnished for or on behalf of the candidate represented by said committee, and shall disburse the same on proper vouchers. If any vacancies be created by death or resignation or any other cause on said committees, said candidate may fill such vacancies, or the remaining members shall discharge and complete the

duties required of said committee as if such a vacancy had not been created. No candidate for nomination or election shall expend any money directly or indirectly in aid of his nomination or election except by contributing to the committee designated by him as aforesad."

It will be noted from the above that a candidate must, within five days after the announcement of his candidacy, file the necessary declaration of appointment or selection with the Secretary of State or the Judge of Probate, as the case may be.

Section 589, Code of 1923, provides as follows:

"Section 589. Candidate acting as own committee—Any person who shall act as his own committee shall be governed by the provisions of this article relating to committees designated by candidates. Failure to make the declaration of appointment or selection by any candidate as herein required is declared to be a corrupt practice, and in addition the name of such candidate so failing shall not be allowed to go upon the ballot at such election."

This section specifically provides that the name of a candidate who fails to make the declaration of appointment or election as is required, shall not be allowed to go on the ballot. The "declaration of appointment or election as is required," as used in this section, in my opinion, refers to the one provided for in Section 588, supra.

The five day limitation in Section 588, supra, in my opinion, is mandatory and cannot be extended. The fact that the name of a candidate, who has failed to comply with the provisions of Section 588, supra, is included in the list furnished by the party committee, is immaterial.

Sections 588 and 589, supra, are not in any way modified or repealed by the Primary Election Law of 1931, (Acts 1931, pp. 73). On the contrary Section 588 is recognized by said Act wherein said section is referred to in Section 56 of the Primary Election Law, as amended by Acts 1931, page 755.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 30, 1936.

Hon. Winston Stewart,
Judge of Probate,
Coosa County,
Rockford, Alabama.

Gasoline tax—Revenue Acts of 1935 Page 511 held to repeal General Acts of 1932, page 270.

1. Funds received by County Treasurer of Coosa County under Schedule 156.9 of the Revene Act of 1935 may not be used for payment of teachers' salaries.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of March 26, 1936 requesting my opinion as follows:

"I wish your opinion with reference to Schedule 156.9 of the Revenue Bill of 1935 which provides in effect that one-third of the proceeds of the excise tax imposed on gasoline shall be divided and distributed equally among the sixty seven counties of the State and that 'such funds, when received by the County Treasurer, shall be covered into the County Road and Bridge Fund and shall be expended exclusively in the construction, maintenance and repair of the public roads and bridges in such county.'

"For your information, I call your attention to the fact that Coosa County, prior to the adoption of the 1935 Revenue Bill, was operating under Act No. 267, approved November 8, 1932 (General Acts 1932, page 270) authorizing the county to expend the proceeds derived from the excise tax on gasoline for the purpose of paying the past due and future salaries of school teachers, etc.

"It is now the plan of the Court of County Commissioners of Coosa County to expend a portion of the one-third of the proceeds of the excise tax received by said County under the provisions of Schedule 156.9 for the purpose of paying the salaries of the school teachers in this county.

"Please advise whether the funds received by the County Treasurer of Coosa County, under Schedule 156.9 may be used for the purposes above mentioned."

In reply, I wish to advise that in my opinion your question must be answered in the negative. Section 156.9 of the Revenue Act of 1935, found in General Acts 1935, p. 511, provides in part as follows:

"One-third of the proceeds of the excise tax herein imposed, less cost of collection and administering this Chapter, shall be paid into the State Treasury to the credit of the sixty-seven counties of the State, and shall be divided and distributed equally among the sixty-seven counties of this State, payment to be made by State Warrant to be mailed to the Treasurer of such counties or depositories of such counties, on or before the 10th day of each month following collection. Such funds when received by the County Treasurer shall be covered into the County road and bridge fund, and shall be expended exclusively in the construction, maintenance and repair of the public roads and bridges in such County. The use or expenditure of any said funds in any other manner or for any other purpose than as provided herein, by the governing body of any County or any individual member of said body, shall constitute a misdemeanor punishable by fine of not less than One Hundred Dollars ($100.00) nor more than One Thousand Dollars ($1,000.00), and by imprisonment in the County jail or at hard labor for the County for not less than one or more than twelve months."

I wish further to refer you to Section 156.11 providing in part as follows:

"***'and the other one half of said 1-3 shall be divided equally among the 67 counties of the State of Alabama, monthly as collected, less the cost of collection, payment to be made to the Couny Treasurer or Depository of said counties on or before the 10th day of each month of the year, and said funds shall be used by the several counties of the State exclusively for the construction, maintenance, supervision and policing of the public roads and bridges in the respective counties; provided, however, that the Board of Revenue or other such governing body of a county may direct the State Tax Commission to pay over to the State Highway Department such part of said funds as may be agreed upon by the Board of Revenue or such other governing body of any county, and the Gov-

ernor of the State of Alabama, which said funds are to be used in the construction and maintenance of roads in said county, to be agreed upon by the Board of Revenue of such county, or such other governing body, and the Governor of the State of Alabama."

I further refer you to Schedule 156.20 which provides in part as follows:

"All laws and parts of laws in conflict with the provisions of this Chapter are hereby repealed, provided that nothing in this Chapter shall be held or construed to repeal any part of Act 55, approved October 5th, 1932, Acts, Special Session, 1932, page 57."

You will note that the last referred to section above specifically provides that all laws and parts of laws in conflict with the provisions of this Chapter are hereby repealed, naming one exception which will not include the General Acts of 1932, page 270 referred to by you. The General Acts of 1932, page 270 in my opinion are in direct conflict with the provisions of the law announced in the above referred to Revenue Act. The conclusion is, therefore, inescapable and in my judgment the General Acts of 1932, page 270, being in conflict with the Revenue Act of 1935 are, therefore, repealed.

I wish further to refer you to an opinion of the Attorney General rendered to Hon. A. H. Collins, Commissioner of Public Welfare, under date of November 12, 1935, Quarterly Report of Attorney General for the period from October 1, 1935 through December 31, 1935, page 168.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 30, 1936.

Hon. Ed Pettus, Secretary-Treasurer,
State Licensing Board for General Contractors,
Montgomery, Alabama.

Plumbing and Heating Companies, Electrical Companies, Companies that install Elevators and Air Conditioning Companies are not such general contractors as defined in an act of the Legislature of Alabama found on page 721 of the General Acts of Alabama, 1935.

Opinion by The Attorney General.

Dear Sir:

I beg to acknowledge receipt of your letter of March 21, as follows:

"Please advise me officially whether or not the following persons, firms or corporations come in the definition of a 'general contractor' as defined by Section 1 of Senate Bill No. 112 numbered 297, a copy of which is attached hereto for your convenience.

"1. Plumbing and heating companies who bid direct to the awarding authority on a job, their part of which involves plumbing and heating only, for a sum involving $10,000.00 or over.

"2. Electrical companies who bid direct to the awarding authority on a job, their part of which involves electrical wiring and installation only, for a sum involving $10,000.00 or over.

"3. Firms that install elevators who bid direct to the awarding authority on a job, their part of which involves elevators only, for a sum of $10,000.00 or over.

"4. Air conditioning companies who bid direct to the awarding authority on a job, their part of which involves air conditioning and installing of such equipment, for a sum of $10,000.00 or over.

"5. Would any of the above concerns come within the definition of 'general contractor' under Section 1 of said Act if they bid to the 'general contractor' for such sub-contract work in their specific line, such as plumbing and heating, but for a sum involving $10,000.00 or over? Or in other words, would a plumbing and heating contractor who does not bid direct to the awarding authority but who bids direct to the general contractor, who gets the job, to do the plumbing and heating work as a sub-contractor to the general contractor, the sub-contract involving the sum of $10,000.00 or over, and only plumbing and heating, would then come under Section 1 of Senate Bill 112?"

I have examined the Act of the Legislature in question, found at page 721 of the General Acts of Alabama 1935. Section 1 of this Act defines a general contractor:

"Section 1. For the purpose of this Act a 'general contractor' is defined to be one who, for a fixed price, commission, fee or wage, undertakes to construct or superintend the construction of any building, highway, sewer, grading, or any improvement or structure where the cost of the undertaking is ten thousand dollars or more, and any one who shall engage in the construction or superintending the construction of any structure or any undertaking or improvements above mentioned, in the State of Alabama, costing ten thousand dollars or more, shall be deemed and held to have engaged in the business of general contracting in the State of Alabama."

The Act is in deed and in fact a "general contractors' Act." Plumbing and heating companies do not construct or superintend the construction of buildings. Electrical companies do not engage in the business of constructing buildings. Companies that install elevators do not engage in the business of constructing or superintending the construction of building and neither do air conditioning companies engage in the business of constructing or superintending the construction of buildings. A reading of the Act as a whole convinces me that the Legislature did not have in mind sub-contractors. In my judgment, so far as your questions are concerned, the Act means this: When the cost of the construction or improvement of any building, highway, sewer or grading is $10,000.00 or more, the person, firm or corporation who undertakes to construct such a building, highway, sewer or grading or who undertakes to improve such a building, highway, sewer or grading, must follow the provisions of the Act.

Sub-contractors who engage in installing plumbing and heating systems, electrical companies that engage in electrical wiring, companies that engage in installing elevators and companies that engage in conditioning the air in buildings do not fall under the influence of the Act. The Act intends to do exactly what it says, namely, to regulate **general contractors,** and not sub-contractors. If the Legislature had intended in the Act to include sub-contractors, such as you mention in your letter, it would have been quite easy for the Legislature to have so indicated.

I am of the opinion that each of your questions above should be answered in the negative.

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

March 31, 1936.

Hon. Ed. Pettus, Secretary-Treasurer,
State Licensing Board for General Contractors,
Bell Building,
Montgomery, Alabama.

State Licensing Board for General Contractors (Acts 1935, p. 721)—

1. Cannot be required to pass upon an application for a certificate unless and until same has been on file for thirty days prior to a regular or special meeting, but where as many as five applications are pending, it is mandatory that meeting be called, and the application disposed of within thirty days.

2. May retain not exceeding ten (10%) percent of past year's operating expense as emergency fund.

3. A. May issue certificate to applicant who has inadvertently violated the provisions of the Act.

3. B. Details Defined.

Opinion by the Attorney General.

Dear Sir:

I have your letter of March 12th, in which you request my opinion as follows:

"I call your attention to Sections 6 and 9 of the above Act. The last paragraph of Section 6 of said Act appears to make it mandatory upon the Board to call a special meeting **within thirty days** to hear, consider and dispose of said applications whenever as many as five applications for a certificate to engage in the business of general contracting are filed with the Board, but Section 9 of the Act appears to require a contractor to file his application with the Board thirty days **prior** to any regular or special meeting thereof. Sections 6 and 9 seem to conflict and I would like to have the following question specifically answered:

"QUESTION ONE. Does the word 'shall' in the last paragraph of Section 6 make it mandatory upon the Board to call a special meeting to consider and dispose of said applications when as many as five applications for a certificate are filed with the Board regardless of whether said applications have been on file with the Board for **thirty** days **prior** to the regular or special meeting of the Board as apparently required by section 9?

"I respectfully call your attention to the last paragraph of Section 7 of said Act, and I would also like for you to officially advise me concerning the following question relative to the last paragraph of Section 7 of said Act:

"QUESTION TWO: What does the following mean: 'To retain at least 10% of the total expense it incurs for a year's operation, to meet any emergency that may arise?' Does 'at least 10%' mean that such per cent is the maximum amount the Board may retain of the expenses or the minimum amount of the expenses, or in other words, do we have to retain at least 10% and may we retain any greater per cent as we deem necessary.

"I respectfully call attention to Section 12 of the above Act.

"QUESTION THREE. Relative to Section 12 of said Act assuming the particular application is correctly drawn and upon examination the Board is of the opinion that the applicant should be issued a license but that the Board discovers that for five days the particular applicant has been engaging in the contracting business without a license, but said activity on the part of the applicant is not willful or intentional violation of the Act, but a violation resulting from ignorance and error.

"A. May the Board issue said applicant a license?

"B. What are the duties and rights of the Board under the particular circumstances relative to Section 12 of said Act "

Your first question must be answered in the affirmative.

It is a cardinal principle for the construction of a statute, that the separate sections thereof should be so construed as to avoid a conflict and give a field of operation to each section, if that can be done without doing violence to the letter of either section.

Mutual Life Insurance Company vs. Allen,
166 Ala. 159, 51 So. 877;
Hendon vs. McCoy, 133 So. 295,

From a casual reading of these two Sections of the statute, there is an apparent conflict, but upon careful consideration, there readily appears a field of operation for each section, which latter interpretation we must presume was the legislative intent. Section 9 imposes upon "any one desiring to be licensed a general contractor" the requirement that he file an application with the board **thirty days prior to** any regular or special meeting of the Board. Provision is made in section 6 of the Act for the two regular annual meetings of the board, certain special meetings under conditions therein named. Thus, it is readily apparent that under section 9 of the Act, an applicant for a license could not enforce action upon his application at any such regular or special meeting of the Board, unless his application had been filed thirty days prior to such regular or special meeting. It is our opinion that this thirty day requirement is for the benefit of the board, and may in their discretion be waived. But, under section 6, by express provision, whenever as many as five applications for a certificate or license should be filed with the board, it is made mandatory that the board thereupon call a special meeting **within thirty days** to pass upon and dispose of said application. It is our opinion that the legislative intent was that the thirty day requirement be imposed upon a single applicant, subject to the right of the board to waive it in their discretion, but that, for the purpose of affording expeditious service to applicants when as many as five applicants were seeking a license this requirement should not apply and the applications should be acted upon without further delay.

The word "shall" in the last sentence of section 6 is clearly mandatory, (Coleman vs. Eutaw, 157 Ala. 327, 57 So. 703), and this being true, it is my opinion that these two sections are incapable of any other logical interpretation.

Answering your question number two, it is necessary in order to arrive at the legislative intent, that we look to the other pertinent portions of the statute which we quote:

> "Section 7. The Secretary-Treasurer shall keep a record of the proceeding of said Board; shall receive and account for all the monies derived from the operation of this Act. **Any funds remaining** in the hands of the Secretary-Treasurer to the credit of the Board **after expenses of the Board for the current year have been paid, shall be paid over to the State Treasurer** to the credit of the general fund of the State, on or before the 15th day of January in each succeeding year. The Board has the right, however, to retain at least ten percent of the total expense it incurs for a year's operation, to meet any emergency that may arise." (Underscoring ours).

It is evident that it was the legislative intent that the proceeds derived from the operations of the board be paid into the State Treasury, excepting a certain amount which it expressly authorized the board to retain for any emergency that might arise. That brings us to the inquiry as to how much they were authorized to retain. The answer is in the statute itself;—at least ten per cent—as much as ten per cent—up to ten per cent. In other words, in the absence of this provision of the statute, the board would have no right to retain any funds whatsoever, but the statute authorizes it to retain as much as ten per cent of the total expense it incurs. The amount it was authorized to retain was only the amount expressly authorized, its authority to retain was enlarged from none at all to ten per cent, a maximum of ten per cent.

The words "at least" have been interpreted to mean "not less than" (Hoffman vs. Clarke County, 20 N.W. 376; Polk vs. Lane, 12 Tenn. 36; Miller vs. State, 94 So. (Miss. 706) and also "not more than" (Hermandoz vs. Creditors, 57 Cal. 333; Warren Mfg. Co. vs. Hoffman, 62 Md. 165; Metropolitan Life Ins. Co. vs. Peeler, 176 Pac. 939). The question of the proper interpretation in each given case must be determined from the context and the language of the remainder of the statute under consideration. If the interpretation first referred to in this paragraph were applied, the result would be that the board would be thereby authorized to retain a minimum of ten (10%) per cent of the fund without a limitation as to the maximum. That is to say, if that interpretation be applied, the board might retain "not less than" ten per cent of the entire fund, and without limiting them to a maximum amount so that they might under that construction retain the entire fund, a power that manifestly was never intended to be conferred by the legislature. The section makes it discretionary to retain or not to retain any portion of the funds, and there would be no logical reason to set a minimum which they might or might not retain. But there is a very logical reason for prescribing a maximum amount which they might in their discretion retain, and it is our opinion that it was clearly the legislative intent that the words "at least" as here used, are synonymous with "a maximum of" or "not more than", and that under the statute the board is authorized to retain not more than ten per cent of the total expense incurred for the year's operation.

Answering your inquiry number 3A, it is our opinion that, the applicant having duly qualified as provided in the statute, the board shall issue the license, irrespective of his previous actions. The statute prescribes the punishment in proper cases for engaging in business without being licensed, but it does not authorize or require the board as a penalty for such conduct, to withhold the issuance of a license. A party violating the provisions of the Act, is amenable in proper cases, to the criminal courts for his misconduct, but in the absence of an express provision of the statute prohibiting the issuance of a license in such case, when the applicant has filed his application in due form, and it has been approved by the board, and the board is of the opinion from his examination and other qualifications that he is qualified, the board may issue the license, even though "through ignorance and error" he has violated the provisions of the statute.

Answering your inquiry number 3B, it is our opinion that the duty of the Board in such a case is to be determined by the facts of the particular case. Under our system of jurisprudence any citizen has the right to present or institute a criminal charge against any other citizen for an infraction of a criminal law. It is the duty of your board zealously to protect the profession for whose benefit and regulation it was organized, and if information comes to the board of the willful and intentional and criminal violation of the Act, it is your duty to invoke the process of the criminal court for the protection of the law abiding members of the profession. But if on the other hand a case should come to your attention when in your judgment a violation was unintentional or was the result of ignorance you are, in my opinion, under no obligation to institute a criminal action against such person, no more so than any private citizen.

Under the Act, your board has no power to punish a violation of the Act, intentional or unintentional, this power being vested exclusively in the criminal courts.

Trusting that this answers your inquiry, I am,

Yours very truly,
A. A. CARMICHAEL,
Attorney General.

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